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No. _____

In The

Supreme Court of the United States

NEIL C. GORDON, as Chapter 7 Trustee for the Estate of Slaughter Company & Associates, Inc.,

Petitioner,

v.

ALCATEL CONTRACTING (N.A.), INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Eleventh Circuit erred when it held that an attorney is entitled to rely on Federal Rule of Bankruptcy Procedure 9010 for receipt of the bar date notice and that the failure by the Bankruptcy Court to send formal notice to the attorney is sufficient to negate the clear language of 11 U.S.C. § 726(a) as supported by Federal Rules of Bankruptcy Procedure 3002(c)(5) and 9006(b)(3).

2. In light of this Court's decision in *Pioneer Investment Services Co. v. Brunswick Assoc. Limited Partnership*, 507 U.S. 380 (1993), whether the Eleventh Circuit erred when it held that bankruptcy courts have the inherent power to correct their own mistakes, presumably under the court's equitable power.

3. Whether the policy implications of the Eleventh Circuit's opinion conflict with the clear Congressional intent of expediency and finality in Chapter 7 cases and place an unreasonable burden on trustees in administering Chapter 7 cases.

4. Whether the Eleventh Circuit erred when it allowed an unsecured creditor's late-filed proof of claim to be treated as timely filed, expanding, in effect, the creditor's substantive rights under the Bankruptcy Code and creating a conflict among the Circuit Courts of Appeal.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Neil C. Gordon, as Trustee for the Estate of Slaughter Company & Associates, Inc., respectfully prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled proceeding on July 25, 2000.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 219 F.3d 1279 and is reprinted in Appendix A hereto. The opinion of the Court of Appeals for the Eleventh Circuit on Petition for Rehearing En Banc has not been reported but is reprinted in Appendix H hereto. The opinion of the United States District Court for the Northern District of Georgia is reported at 251 B.R. 437 and is reprinted in Appendix B hereto. The Judgment of the United States District Court is reprinted in Appendix C hereto. The order of the United States District denying the Trustee's Motion for Reconsideration is reprinted in Appendix D hereto. The decision of the United States Bankruptcy Court for the Northern District of Georgia has not been reported. It is reprinted in Appendix E hereto. The opinion of the United States Bankruptcy Court denying Alcatel's Motion for Reconsideration is reprinted in Appendix F hereto.

BASIS FOR JURISDICTION

On July 25, 2000, the Eleventh Circuit, *per curiam*, affirmed the decision of the United States District Court for the Northern District of Georgia and allowed a creditor's late-filed proof of claim in a Chapter 7 case to be treated as timely-filed for purposes of distribution under 11 U.S.C. § 726. The Trustee then sought rehearing *en banc*, and the Eleventh Circuit denied this request by order dated September 25, 2000.

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1) to review the order of the Eleventh Circuit.

STATUTE AND RULES INVOLVED

11 U.S.C. § 726
Fed. R. Bankr. P. 2002
Fed. R. Bankr. P. 3002
Fed. R. Bankr. P. 9006
Fed. R. Bankr. P. 9010

STATEMENT OF THE CASE

On July 24, 1996, Slaughter Company & Associates, Inc. filed a petition for relief under Chapter 7 of the United States Bankruptcy Code. Neil C. Gordon, Esq. was appointed as the Chapter 7 Trustee. The Chapter 7 case was listed as a "no asset" case, and the Bankruptcy Court notified all creditors that they were not to file a proof of claim unless they were notified to do so.

In its Schedule F, the Debtor listed an undisputed, liquidated, and non-contingent debt owing to Alcatel Contracting (N.A.), Inc. On September 5, 1996, the law firm of Parker, Hudson, Rainer & Dobbs LLP ("Parker Hudson") filed a Notice of Appearance and Request for Notices (the "Request for Notices") as counsel for Alcatel pursuant to Bankruptcy Rules 2002, 9007, and 9010. In the Request for Notices, Parker Hudson requested that notices be sent directly to both Alcatel and Parker Hudson.

On or about February 11, 1998, the Trustee advised the Bankruptcy Court that he anticipated a distribution to the unsecured creditors. Thereafter, on February 12, 1998, the Bankruptcy Court issued a notice to the Debtor's creditors, attached hereto as Appendix G, which set a bar date of May 12, 1998 for filing proofs of claim. The Bankruptcy Court sent a copy of the bar date notice to Alcatel at the address listed both in Alcatel's schedules and in the Request for Notices filed by Alcatel's attorney of record. The Bankruptcy Court did not send a copy of the bar date notice to Parker Hudson.

On June 18, 1998, more than one month after the bar date, Alcatel filed a proof of claim in the amount of $359,010.09. On July 13, 1998, Alcatel filed a motion in the Bankruptcy Court requesting that its untimely-filed proof of claim be treated as timely filed.

On December 10, 1998, the Bankruptcy Court, without a hearing, entered an Order allowing Alcatel to file its proof of claim but denying Alcatel's request that its proof of claim be treated as timely filed. The Bankruptcy Court held that Alcatel's actual knowledge of the Debtor's case

precluded Alcatel's claim from being treated as timely filed for purposes of 11 U.S.C. § 726(a)(2)(C), even though actual notice of the bar date had not been sent to Alcatel's counsel. Alcatel had received notice of the filing of the Chapter 7 case and was present at the § 341 first meeting of creditors held on August 30, 1996.

Alcatel subsequently filed a Motion for Reconsideration on December 21, 1998, which the Bankruptcy Court denied on February 16, 1999. Alcatel then filed a Notice of Appeal of the Bankruptcy Court's Orders in the District Court on February 22, 1999. Alcatel, with the consent of the trustee, filed two Motions for Extension of Time to file its brief, both of which the District Court granted, and Alcatel filed its brief in the District Court on May 11, 1999. Thereafter, on May 27, 1999, the Trustee sought its first and only extension of time in which to file its responsive brief due June 1, 1999, consent for which had also been given by Alcatel, yet the District Court denied the Trustee's Motion without explanation and after the deadline to file the responsive brief had expired.

On September 8, 1999, the District Court entered an Order reversing the Bankruptcy Court's Order and allowing Alcatel's late-filed proof of claim to be treated as timely filed. On September 23, 1999, the Trustee filed a Motion for Reconsideration in the District Court, and the Motion was denied on November 4, 1999.

The Trustee then filed a timely Notice of Appeal in the Court of Appeals of the Eleventh Circuit. After brief and oral argument, the Eleventh Circuit, *per curiam*, affirmed the decision of the District Court on July 25, 2000. The Trustee then filed a Motion for Reconsideration

en banc, which the Eleventh Circuit denied on September 25, 2000.

ALLOWANCE OF THE WRIT

The Eleventh Circuit's opinion disregards and is in conflict with relevant decisions of this Court, of other Circuit Courts of Appeal, and of numerous other lower courts and in contravention of the plain meaning of 11 U.S.C. § 726(a) and Federal Rules of Bankruptcy Procedure 3002 and 9006. Specifically, the Eleventh Circuit, without even a mention of these other cases, statute, and rules, impermissibly held that Alcatel's tardily-filed proof of claim in a Chapter 7 case would be allowed as timely filed, even though Alcatel clearly had knowledge of the bankruptcy case prior to the bar date and did not meet with any of the exceptions set forth in either the Bankruptcy Code or Rules.

I.

THE ELEVENTH CIRCUIT'S DECISION CONTRADICTS THE PLAIN MEANING OF 11 U.S.C. § 726 AS SUPPLEMENTED BY RULES 3002(c) AND 9006(b)(3)

Since this Court's decision in *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989), this Court has consistently held that federal statutes, including bankruptcy statutes, should be interpreted according to their plain meaning. *See, e.g., Miller v. French*, 120 S. Ct. 2246, 2248 (2000) (finding that federal statute must be interpreted according to its plain meaning); *Fischer v. United States*,

120 S. Ct. 1780, 1793 (2000) (invalidating argument inconsistent with plain meaning of statute).

In *Ron Pair*, this Court stated: "As long as the statutory scheme is coherent and consistent, there is generally no need for a court to inquire beyond the plain language of the statute." *Ron Pair*, 489 U.S. at 240; *see also United States Nat'l Bank of Oregon v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 454 (1993) ("A statute's plain meaning must be enforced, of course, and the meaning of a statute will typically heed the commands of its punctuation."); *Inglesby et al. v. Moore (In re American Steel Product, Inc.)*, 197 F.3d 1354, 1356 (11th Cir. 1999) ("It is well-settled that courts are required to apply the plain meaning canon of statutory construction in interpretation of the Bankruptcy Code."); *Taylor v. AGE Federal Credit Union (In re Taylor)*, 3 F.3d 1512, 1516 (11th Cir. 1993) (holding that plain meaning of 11 U.S.C. § 521(2) requires debtors to redeem, reaffirm, or surrender collateral).

Because the Eleventh Circuit failed to follow the plain meaning of § 726, as is required under the precedent set by this Court when the statute's meaning is clear on its face, the Eleventh Circuit must be reversed.

Pursuant to 11 U.S.C. § 726, which governs the distribution of property of the estate, a creditor's late-filed proof of claim must be given third priority status in order of distribution if that creditor had knowledge of the bankruptcy case. *See* 11 U.S.C. § 726(a)(3). Section 726(a) provides in pertinent part:

> (a) Except as provided in section 510 of this title, property of the estate shall be distributed –

. . .

(2) second, in payment of any allowed unsecured claim, other than a claim of a kind specified in paragraph (1), (3), or (4) of this subsection, proof of which is –

(A) timely filed under section 501(a) of this title;

(B) timely filed under section 501(b) or 501(c) of this title; or

(C) tardily filed under section 501(a) of this title, if

(i) the creditor that holds such claim did not have notice or actual knowledge of the case in time for filing of a proof of such claim under section 501(a) of this title; and

(ii) proof of such claim is filed in time to permit payment of such claim;

(3) third, in payment of any allowed unsecured claim proof of which is tardily filed under section 501(a) of this title other than a claim of the kind specified in paragraph (2)(C) of this subsection.

This statute is clear. When a creditor has notice or actual knowledge of a bankruptcy case, then, as the Bankruptcy Court correctly held, its late-filed proof of claim must be paid according to the distribution scheme as third priority, after administrative and timely-filed claims. *See, e.g., Cooper v. IRS*, 167 F.3d 857, 858 (4th Cir. 1999) ("The order of payment [under § 726] is usually straightforward: first, priority claims; second, timely general claims and untimely general claims when the creditor *lacked notice of the case*; third, other untimely

claims . . . ") (emphasis added); *Schlant v. FDIC (In re P & L Credit and Collection Servs., Inc.)*, 248 B.R. 32, 35 (W.D.N.Y. 2000) (finding that because creditor had knowledge of the bankruptcy case prior to the claims bar date, "under the plain language of § 726(a)(2), the [creditor's] claim should not have been allowed as a second-level claim under § 726(a)(2)"); *Ford Bus. Forms, Inc. v. Sure Card, Inc.*, 180 B.R. 294, 295 (S.D. Fla. 1994) ("It is significant that the Eleventh Circuit held in *Alton* that constitutional due process requires only notice or actual knowledge *of the bankruptcy case generally;* it does not require notice or actual knowledge of the particular bar date for filing claims.") (emphasis in original); *In re Armstrong*, 238 B.R. 438, 441 (Bankr. E.D. Ark. 1999) (stating that for purposes of distribution according to § 726(a)(2), under both the Bankruptcy Code and Rules, the issue is "whether the claimants had notice of the case, as opposed [sic] specific notice of the bar date"); *In re Glenwood Med. Group, Ltd.*, 211 B.R. 282, 290 (Bankr. N.D. Ill. 1997) (stating that "§ 726(a)(3) accords lower priority to a general unsecured claim filed by a creditor who did have timely notice or knowledge of the bankruptcy but filed late"); *In re Osman*, 164 B.R. 709, 713 (Bankr. S.D. Ga. 1993) ("Section 726(a)(3) on the other hand, penalizes a tardily filing creditor who did receive notice or have actual knowledge of the case by subordinating that creditor one level below that of unsecured creditors."); *In re Kragness*, 82 B.R. 553, 555 (Bankr. D. Or. 1988) ("In short, the operative fact is whether or not the creditor has notice of the debtor's bankruptcy proceeding in time to file a timely proof of claim under § 726 . . . ").

In a bankruptcy court decision out of the Eleventh Circuit factually similar to the case at bar, the court held that because the creditor had notice of the bankruptcy case prior to the deadline for filing proofs of claim, a new bar date would not be set, even though due to a mailing matrix error, the creditor did not receive actual notice of the bar date. *See In re L. Meyer & Son Seafood Corp.*, 188 B.R. 315, 319 (Bankr. S.D. Fla. 1995). In *Meyer*, the court used the wrong mailing matrix when sending out notice of the claims bar date, and the creditor was not included in the matrix and did not receive actual notice of the bar date. *See id.* at 317. The creditor argued that due process requires that creditors must be given actual notice of the bar date, but the court found that under the standard set forth by the court in *Ford Business Forms*, constitutional due process requirements are satisfied if a creditor has actual knowledge of the bankruptcy case prior to the claims bar date. *See id.* at 319.

The statute itself is neither cited nor referenced in either the District Court's opinion or the opinion of the Eleventh Circuit. The Eleventh Circuit's refusal to refer to the statute or to interpret the plain meaning of its language is in direct contravention of *Kelly v. Robinson*, 479 U.S. 36 (1986), wherein this Court found that " 'the starting point in every case involving construction of a statute is the language itself.' " *Id.* at 43 (citing *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975)). In *Kelly*, this Court further stated that the language of a statute should be considered in light of the provisions of the law as a whole, as well as the object and policy of the law. *See id.* at 43-44.

The Eleventh Circuit also refused to discuss or to cite the applicable Rules of Bankruptcy Procedure promulgated by this Court, Rules 3002(c) and 9006(b)(3). Rule 3002(c), which governs the time for filing a proof of claim or interest, states that in a Chapter 7 case, a proof of claim is timely filed if it is filed not later than ninety days after the § 341 Meeting of Creditors, except in limited circumstances. Of the five limited circumstances set forth in Rule 3002(c), only one is applicable to the case at bar. Rule 3002(c)(5) states:

> (5) If notice of insufficient assets to pay a dividend was given to creditors pursuant to Rule 2002(e), and subsequently the trustee notifies the court that payment of a dividend appears possible, the clerk shall notify the creditors of that fact and that they may file proofs of claim within 90 days after the mailing of the notice.

Rule 9006(b)(3) states that the court may enlarge the time for taking certain actions, including those actions taken under Rule 3002(c), "only to the extent and under the conditions stated in those rules." Fed. R. Bankr. P. 9006(b)(3).

Under the clear language of the Rules, there are no exceptions to the treatment of a late-filed proof of claim not set forth in Rule 3002(c). The plain language of the statute and the Rules do not allow for any discretion on the part of the bankruptcy court to enlarge the time within which a creditor may file a proof of claim. *See, e.g., Zidell, Inc. v. Forsch (In re Coastal Alaska Lines, Inc.)*, 920 F.3d 1428, 1432 (9th Cir. 1990) (stating that "the 90-day deadline for filing claims under Rule 3002(c) cannot be extended for excusable neglect"); *Aboody v. United States*

(In re Aboody), 223 B.R. 36, 37-38 (B.A.P. 1st Cir. 1998) ("Although the court can generally permit actions based on excusable neglect under Fed. R. Bankr. P. 9006(b)(1), pursuant to Fed. R. Bankr. P. 9006(b)(3), the court's discretion to enlarge the time to file a proof of claim in a Chapter 13 is limited to the conditions in Rule 3002."); *In re Elmont Elec. Co.*, 206 B.R. 41, 43 (Bankr. E.D.N.Y. 1997) ("By the express words of Bankruptcy Rule 9006(b)(3), the Court may not enlarge that time period [for filing a proof of claim]."); *In re Hamilton*, 179 B.R. 749, 755 (Bankr. S.D. Ga. 1995) ("The six enumerated exceptions contained in Bankruptcy Rule 3002(c) are the exclusive means available to a creditor with notice of the bankruptcy proceedings to file a late proof of claim."); *In re Forrester*, 1995 WL 499615 (Bankr. D.N.J. 1994) ("Thus, the deadline for a creditor to file a proof of claim in a Chapter 7 liquidation is valid and enforceable; the court lacks the discretion to extend the deadline once it has passed."); *In re Jones*, 154 B.R. 816, 818 (Bankr. M.D. Ga. 1993) ("The time for filing proofs of claim in a Chapter 7 or Chapter 13 case can be extended only for the six reasons set forth in Rule 3002(c).").

It is undisputed that the Bankruptcy Court sent written notice of the bar date for filing proofs of claim to Alcatel at the address provided both by the Debtor on its schedules and by Alcatel's attorneys in the Request for Notices.

There is no provision in the Bankruptcy Code or Rules which would allow Alcatel's late-filed proof of claim to be treated as timely filed. Alcatel does not meet any of the specific situations set forth in Bankruptcy Rule

3002(c), and under Rule 9006(b)(3), those situations listed in Rule 3002(c) are the only exceptions.

Petitioner urges this Court to apply the plain meaning of § 726 and Rules 3002(c) and 9006(b)(3) and to hold that there is no basis to permit a late-filed proof of claim to be treated as timely filed, other than those grounds specifically set forth in the Bankruptcy Code and Rules, and that bankruptcy courts have no equitable jurisdiction to enlarge the time during which a proof of claim may be deemed timely filed.

II.

THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *PIONEER*

This Court, in *Pioneer Investment Services Co. v. Brunswick Assoc. Limited Partnership*, 507 U.S. 380 (1993), held that a party's failure to file its proof of claim before the claims bar date may constitute "excusable neglect," but that the doctrine of "excusable neglect" applies only in the context of a Chapter 11 proceeding. *See id.* at 388-89 ("The 'excusable neglect' standard of Rule 9006(b)(1) governs late filings of proofs of claim in Chapter 11 cases but not in Chapter 7 cases."); *see also id.* at 389 n.4 ("Such filings [of proofs of claim in Chapter 7 cases] are governed exclusively by Rule 3002(c).").

In *Pioneer*, this Court reasoned that the differences between the policies behind Chapters 11 and 7 dictate the different treatment of late-filed proofs of claim. According to this Court's analysis, because the purpose behind a

case filed under Chapter 11 is to reorganize and rehabilitate the debtor, "the bankruptcy courts are necessarily entrusted with broad equitable powers to balance the interests of the affected parties, guided by the overriding goal of ensuring the success of the reorganization." *Id.* at 389. This Court noted that by contrast, the goal of a Chapter 7 liquidation is "the prompt closure and distribution of the debtor's estate. . . . " *Id.; accord Aboody v. United States (In re Aboody)*, 223 B.R. 36, 38-39 (B.A.P. 1st Cir. 1998) ("The purpose behind the claims bar date in bankruptcy, as in the case before us, is 'to provide the debtor and its creditors with finality' and to 'insure the swift distribution' of the liquidated estate.") (citations omitted).

The Eleventh Circuit's decision in this case is in direct contravention to this Court's holding in *Pioneer*. By holding, in effect, that a bankruptcy court may, under its equitable powers, enlarge the time for filing a proof of claim in a Chapter 7 case, the Eleventh Circuit circumvented this Court's holding in *Pioneer* and set a dangerous precedent with respect to a trustee's ability to administer an estate effectively.

III.

THE ELEVENTH CIRCUIT'S DECISION CONTRADICTS THE POLICY BEHIND AN EFFECTIVE LIQUIDATION UNDER CHAPTER 7

As this Court reasoned in *Pioneer*, there are differing policies furthered by Chapter 11 cases and Chapter 7 cases. The ultimate goal of a Chapter 7 case is an efficient liquidation of the debtor's estate, and a fluid deadline for

the filing of proofs of claim disturbs this goal. As the court noted in *In re Duarte*, 146 B.R. 958 (Bankr. W.D. Tex. 1992), when it refused to apply an excusable neglect standard in the context of a Chapter 13 case:

> A hard and fast deadline for creditor's claims has its roots not in equity but in the necessity for prompt and efficient administration of the case; untimely creditor claims simply undermine the distribution process. As it is, Rule 3002(c) does contain a few equitable exceptions, but an "exception" permitting late claims for "excusable neglect" would quickly swallow the rule, imposing an administrative cost on chapter 7 and chapter 13 cases directly contrary to the goal of "just, speedy and inexpensive determination of cases" and their "expeditious and efficient administration," said to be the chief purpose of the bankruptcy laws.

Id. at 962; *see also Ford Bus. Forms, Inc. v. Sure Card, Inc.*, 180 B.R. 294, 297 (S.D. Fla. 1994) (citing *Pioneer* and finding that "in Chapter 7 cases . . . finality is important because the goal of a Chapter 7 case is to close and distribute a debtor's estate promptly"); *In re L. Meyer & Son Seafood Corp.*, 188 B.R. 315, 318 (Bankr. S.D. Fla. 1995) (distinguishing Chapter 11 cases from Chapter 7 cases based upon the fact that "the statutory language and policies are different" between the two chapters).

Congress clearly intended to promote finality in the context of Chapter 7 cases, and to allow a creditor to file a proof of claim after the bar date, when that creditor obviously had knowledge of the case prior to the bar date for filing proofs of claim, violates both this policy and the plain language of § 726. Had Congress intended to create

an exception to the bar date for creditors with actual knowledge of the case but whose attorney did not receive notice of the bar date, Congress could have done so. However, Congress clearly intended, in § 726, that once a creditor has actual knowledge of the bankruptcy case, that creditor must act promptly to protect its interests. For the Eleventh Circuit to hold otherwise undermines this intent.

The Eleventh Circuit's allowance of a clerk's office matrix mailing error to create an otherwise unrecognized exception to the clear Congressional intent behind § 726 and that section's plain meaning places an unreasonable burden upon Chapter 7 trustees in administering the assets of an estate. Clearly, a creditor with knowledge of a bankruptcy case is in a better position and has more incentive to monitor the bankruptcy case and to ensure that the creditor's interests are protected. A diligent creditor would do more than simply file a Request for Notices with the bankruptcy court and then sit back to await further word from the court before acting upon its claim. By sanctioning this type of behavior, the Eleventh Circuit has placed the burden upon the Chapter 7 trustee, and not the creditor, to monitor the clerk's office matrix to ensure that proper notice is being sent to the appropriate parties in order for the trustee to avoid liability in administering the assets of the estate.

The Congressional policy behind Chapter 7 cases would better be served by the application of the clear

language of § 726 and the reversal of the Eleventh Circuit's decision to allow a late-filed proof of claim to be treated as timely filed under no express authority in the Bankruptcy Code or Rules.

IV.

THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL

The Eleventh Circuit's decision to allow Alcatel's late-filed proof of claim to be treated as timely filed, presumably under the court's equitable power, creates a split in authority among the Circuit Courts of Appeal, which have held that courts may not enlarge the time for filing proofs of claim unless one of the five exceptions listed in Rule 3002(c) exists.

In *Zidell, Inc. v. Forsch (In re Coastal Alaska Lines, Inc.)*, 920 F.2d 1428 (9th Cir. 1990), an unsecured creditor in a Chapter 7 case did not receive written notice of the bar date for filing proofs of claim. The creditor filed a motion for enlargement of time to file his proof of claim based upon his failure to receive actual notice of the claims bar date, but the bankruptcy court held that the creditor failed to show that he fit within any of the exceptions set forth in Bankruptcy Rule 3002(c) and was entitled to third-tier distribution under 11 U.S.C. § 726(a)(3). *See id.* at 1429-30.

This decision was affirmed by both the district court and the Ninth Circuit. The Ninth Circuit rejected the creditor's argument that his due process rights had been violated and held that the creditor "actually received

information about the bankruptcy proceedings that was sufficient to put it on inquiry notice." *Id.* at 1431.

The Ninth Circuit also rejected the creditor's argument that the court could use its equitable powers to enlarge the time for filing a proof of claim. *See id.* at 1432. In so rejecting this argument, the Ninth Circuit applied the plain language of Rule 9006(b), which "plainly allows an extension of the 90-day time limit established by Rule 3002(c) only under the conditions permitted by Rule 3002(c)." *Id.; see also id.* at 1434 (citing to the legislative history of § 726 and holding that "if a creditor knows of the bankruptcy, it does not qualify for relief under § 726").

Virtually all courts have held that bankruptcy judges have no discretion to allow a late-filed proof of claim to be treated as timely filed absent one of the exceptions set forth in Rule 3002(c) as supplemented by Rule 9006(b)(3). *See, e.g., Dicker v. Dye (In re Edelman)*, 237 B.R. 146, 152-53 (B.A.P. 9th Cir. 1999) (finding that the rule as set forth in *Coastal Alaska* is "that no source of discretion exists – neither equitable jurisdiction, nor § 105, nor anything else – and a source is not created even if a good reason is presented for why a source should exist"); *In re Boehm*, 252 B.R. 576, 578 (Bankr. M.D. Fla. 2000) ("The bankruptcy court does not have equitable discretion to extend the deadline for the filing of an untimely claim when none of the exceptions expressly provided in Rule 3002(c) exist and excusable neglect is not one of the exceptions."); *In re Stalf*, 252 B.R. 168, 169 (Bankr. E.D. Mo. 2000) ("The Court may enlarge the time for taking action under Rule 3002(c) only to the extent and under the conditions stated therein.").

There is now a split of authority among the circuits because the decision by the Eleventh Circuit to allow a late-filed proof of claim to be deemed timely filed even though the creditor had actual knowledge of the case prior to the bar date conflicts with the Ninth Circuit's decision in *Coastal Alaska* and the lower courts throughout the country, including within the Eleventh Circuit itself.

V.

THE ELEVENTH CIRCUIT'S REASONING WAS FLAWED AND ITS DECISION WAS BASED UPON CASE LAW INAPPOSITE TO THE CASE AT BAR

The Eleventh Circuit's opinion refers to the "thorough and well reasoned" order of the District Court. The District Court's reasoning, adopted by the Eleventh Circuit when it affirmed the District Court, was flawed for several reasons. Not only did the court refuse to discuss the applicable case law, but it failed even to mention or interpret the very Bankruptcy Code sections and Rules at issue, relying instead upon case law which does not support the court's ultimate conclusion.

The court cites *Nicholson v. Isaacman (In re Isaacman)*, 26 F.3d 629 (6th Cir. 1994) and *In re Themy*, 6 F.3d 688 (10th Cir. 1993) for the proposition that creditors are entitled to rely on the Bankruptcy Court clerk. In *Isaacman*, the court held that if the bankruptcy court sets a bar date for filing non-dischargeability complaints and a creditor reasonably relies upon that bar date, the bankruptcy court should allow all complaints filed before the bar date to proceed. *See Isaacman*, 26 F.3d at 632. The

court found that creditors are entitled to rely on the information supplied by the bankruptcy court, and that if the court issues erroneous information as to a bar date and a creditor relies upon the erroneous date, that court should exercise its equitable powers to prevent the injustice that would result from not enforcing the bar date. *See id.* The cases cited by the court in *Isaacman* all concerned situations in which the bankruptcy clerk's office set an erroneous bar date, upon which the courts found that creditors were entitled to rely. *See id.* at 632-33.

In *Themy*, the bankruptcy court issued a bar date notice for non-dischargeability complaints and complaints objecting to discharge, which notice contained the wrong date. *See Themy*, 6 F.3d at 689. A creditor, in reliance upon the erroneous bar date, filed a complaint objecting to discharge and a non-dischargeability complaint. *See id.* The court found that bankruptcy courts may act under their equitable powers to correct a court mistake where an incorrect deadline has been set. *See id.* at 690 (stating that courts should correct their own mistakes when the court "affirmatively misleads the creditor as to a deadline . . . ").

Isaacman and *Themy* are distinguishable on their facts, and both cases are inapposite to the case at bar. Neither *Isaacman* nor *Themy* concerned the deadline for filing a proof of claim, and in both cases, the bankruptcy court clerk's office erred in setting an incorrect deadline. Under the reasoning of both cases, because the clerk's office affirmatively set forth an erroneous bar date, the court could, under its equitable powers, correct its own affirmative mistake.

Under the facts of the case at bar, the bankruptcy court clerk's office did not set forth an incorrect deadline

for filing proofs of claim upon which creditors relied in filing their claims. Therefore, the injustice that the courts in *Isaacman* and *Themy* attempted to correct is not present under these facts. Moreover, creditors routinely have extended the bar date for objecting to discharge by simply filing a motion with the court requesting same; whereas, there is no corresponding procedure to have a Chapter 7 claims bar date extended. This further dramatizes the inapplicability of the cases relied upon by the Eleventh Circuit.

VI.

CONCLUSION

Petitioner urges this Court to issue a writ of certiorari to review the decision of the Eleventh Circuit because the decision is in conflict with another Circuit Court of Appeal and with a prior decision of this Court, and the policy ramifications of the decision set a dangerous precedent with respect to a Chapter 7 trustee's ability to administer an estate effectively. The Eleventh Circuit disregarded the plain meaning of 11 U.S.C. § 726 and Bankruptcy Rules 3002 and 9006 and impermissibly allowed Bankruptcy Rule 9010 to render the language and Congressional intent of § 726 meaningless. Accordingly, the Eleventh Circuit must be reversed.

Respectfully submitted,

NEIL C. GORDON, ESQ.
MACEY, WILENSKY, COHEN,
WITTNER & KESSLER
Suite 600, Marquis Two Tower
285 Peachtree Center Avenue, N.E.
Atlanta, Georgia 30303

APPENDIX A

United States Court of Appeals,
Eleventh Circuit.

In re: SLAUGTHER COMPANY & ASSOCIATES, Debtor.

**Alcatel Contracting (NA), Inc.,
Plaintiff-Appellee,**

v.

Neil C. Gordon, Trustee-Appellant.

No. 99-15093.

July 25, 2000.

Louis G. McBryan, Atlanta, GA, for Trustee-Appellant.

Jack C. Basham, Jr., James R. Rankin, Jr., Parker, Hudson, Rainer & Dobbs, LLP, Atlanta, GA, for Plaintiff-Appellee.

Appeal from the United States District Court for the Northern District of Georgia (No. 99-00741-CV-GET-1); G. Ernest Tidwell, Judge.

Before TJOFLAT and HULL, Circuit Judges, and PROPST*, District Judge.

PER CURIAM:

After review and oral argument, we affirm in full the judgment of the district court which reversed the bankruptcy court's denial of Appellant Alcatel's motion to have its proof of claim treated as timely filed.

---

* Honorable Robert B. Propst, U.S. District Judge for the Northern District of Alabama, sitting by designation.

The judgment of the district court is correct for the reasons set out in the district court's thorough and well-reasoned order, dated September 8, 1999.

AFFIRMED.

APPENDIX B

United States District Court,
N.D. Georgia,
Atlanta Division.

ALCATEL CONTRACTING (NA), INC.,
Appellant,

v.

SLAUGHTER COMPANY & ASSOCIATES,
Appellee/Debtor.
Neil C. Gordon Trustee.

No. CIV.A.1:99-CV-741-GET.

Sept. 8, 1999.

Jack Calhoun Basham, Jr., Parker Hudson Rainer & Dobbs, Atlanta, GA, for Alcatel Contracting (NA), Inc., Appellants.

James C. West, III, Office of James C. West, III, Decatur, GA, for Slaughter Company & Associates, Appellees.

Neil C. Gordon, Macey Wilensky Cohen Wittmer & Kessler, Atlanta, GA, for Neil C. Gordon, Trustee.

ORDER

G. ERNEST TIDWELL, Chief Judge.

The above-styled matter is presently before the court on appeal from the Bankruptcy Court's orders entered on December 10, 1998 and February 16, 1999. Appellant, Alcatel Contracting (NA), Inc. ("Alcatel") raises the following issues on appeal:

1) Whether the Bankruptcy Court erred in denying Alcatel's motion to treat its late-filed proof of claim against the Debtor Slaughter Company & Associates as timely, and in denying Alcatel's motion to reconsider the Bankruptcy Court's decision, when Alcatel was entitled to but did not receive notice of the bar date due to the Bankruptcy Court's error in failing to add Alcatel's counsel to the mailing matrix; and

2) Whether Section 726(a) of the Bankruptcy Code, as applied to the circumstances of this case or on its face, violates Alcatel's constitutional right to due process and is unconstitutionally overbroad.

Standard of Review

The district court has jurisdiction over this appeal pursuant to 28 U.S.C. § 158. Under Federal Rule of Bankruptcy Procedure 8013, findings of fact shall not be set aside unless "clearly erroneous" and conclusions of law are reviewed de novo. *In re Das A. Borden & Co.*, 131 F.3d 1459, 1462 (11th Cir.1997). Trustee Neil C. Gordon's motion to extend time to file a response brief was denied by this court on June 7, 1999 and the response will not be considered on appeal.

Factual and Procedural Background

The essential facts are undisputed. On July 24, 1996, the debtor, Slaughter Company & Associates ("Debtor"), filed a petition for relief under Chapter 7 of the United States Bankruptcy Code. Neil C, Gordon, Esq., was appointed as Trustee ("Trustee") for the Debtor. Alcatel is an unsecured creditor of the Debtor. In the Schedule F

filed by the Debtor with the Bankruptcy Court listing its unsecured creditors, Alcatel is listed as having an undisputed, liquidated and non-contingent claim. The Debtor's Chapter 7 bankruptcy case was designated as a "no assets" case and the Bankruptcy Court advised all creditors as follows: "DO NOT FILE A PROOF OF CLAIM UNLESS YOU RECEIVE A COURT NOTICE TO DO SO."

On September 5, 1996, the law firm of Parker, Hudson Rainer & Dobbs ("Parker Hudson") filed a Notice of Appearance and Request for Notices ("Request for Notices") as counsel for Alcatel pursuant to Bankruptcy Rules 2002, 9007 and 9010. The Request for Notices directs the Bankruptcy Court to send all notices to Parker Hudson and gives the mailing address for the firm. The Request for Notices also includes Alcatel's mailing address as: 2001 Westside Parkway, Suite 190, Alpharetta, Georgia 30201.

On or about February 11, 1998, the Trustee advised the Bankruptcy Court that there might be assets available for distribution to the Debtor's unsecured creditors and on February 12, 1998, the Bankruptcy Court issued a notice to the Debtor's creditors instructing them to file proofs of claim by May 12, 1998 (the "Bar Date Notice"). It is undisputed that the Bankruptcy Court did not send a copy of the Bar Date Notice to Parker Hudson and that Parker Hudson did not receive notice of the bar date. Although Alcatel's Westside Parkway address was listed on the Certificate of Service for the Bar Date Notice, Alcatel had moved to a different address prior to the mailing of the notices and therefore, did not receive the Bar Date Notice.

Upon learning of the Bar Date Notice, Parker Hudson notified the Trustee of Alcatel's claim and its failure to receive the Bar Date Notice. On June 18, 1998, Alcatel filed a proof of claim against the Debtor in the Amount of $359,010.09. On July 13, 1998, Alcatel filed its motion in the Bankruptcy Court requesting that its proof of claim be treated as a timely filed claim.

On December 10, 1998, the Bankruptcy Court entered an order allowing Alcatel to file a proof of claim but denying Alcatel's request that the claim be treated as timely filed. In so doing, the court relied on *Byrd v. Alton*, 837 F.2d 457 (11th Cir.1988) for the proposition that lack of actual notice of the claims' bar date does not provide grounds for excusing failure to timely file a proof of claim where the creditor has actual knowledge of the bankruptcy case. As a result of the Bankruptcy Court's action, Alcatel does not have a priority claim and will receive distribution of any property of the estate remaining after payment of timely filed claims pursuant to 11 U.S.C. § 726(a)(3). On February 16, 1999, the Bankruptcy Court denied Alcatel's Motion for Reconsideration.

Discussion

Rule 9010 of the Bankruptcy Rules authorizes a creditor to appear in a bankruptcy case through an attorney and have the attorney act on its behalf. Rule 2002(g) specifically requires that "[a]ll Notices required to be mailed under this rule to a creditor . . . shall be addressed as such entity or an authorized agent may direct in a filed request. . . . " Bankruptcy Rule 2002(g) (emphasis added). Parker Hudson filed the Request for Notices with the

Bankruptcy Court approximately 18 months before the Bar Date Notice was issued. The Request for Notices specifically directed the Bankruptcy Court to send all notices to Parker Hudson. Therefore, the Bankruptcy Court had an affirmative duty to send notice of the Bar Date to Parker Hudson on behalf of Alcatel. Bankruptcy Rule 2002(g); *See In re Melvin*, 1990 WL 375159 (Bankr.S.D.Ga. October 18, 1990) (vacating Chapter 13 confirmation order where debtor did not give notice to creditor's attorney after attorney made appearance of record even though the creditor received actual notice).

The *Byrd* case cited by the Bankruptcy Court is distinguishable and does not support the action taken by the Bankruptcy Court in this case. In *Byrd*, the Eleventh Circuit specifically found that the Bankruptcy Court had fulfilled its statutory duty to provide notice to all known creditors. *Byrd*, 837 F.2d at 460. In the present action, it is undisputed that, despite a Notice of Appearance and Request for Notices filed in the Bankruptcy Court by Parker Hudson on behalf of Alcatel, no Bar Date Notice was sent to Parker Hudson. Furthermore, because the Bankruptcy Court specifically directed the creditors not to file a proof of claim "unless you receive a court notice to do so," this was not a case where the creditor could independently determine the Bar Date by referring to the Bankruptcy Code or Bankruptcy Rules.

A creditor is entitled to rely on the Bankruptcy Court clerk. *In re Isaacman*, 26 F.3d 629, 632-634 (6th Cir.1994); *In re Themy*, 6 F.3d 688, 689 (10th Cir.1993). Once the Request for Notice was filed, Parker Hudson was entitled to receive the Bar Date Notice. *In re Lomas Financial Corporation*, 212 B.R. 46 (Bankr.D.Del.1997) (creditor denied due

process when debtor failed to give creditor's attorney notice of hearing after attorney filed notice of appearance under Bankruptcy Rule 9010). Therefore, the Bankruptcy Court erred in refusing to treat Alcatel's proof of claim as timely filed when notice of the Bar Date was not sent to Alcatel's counsel as requested.

Furthermore, it is within the Bankruptcy Court's power to correct such errors. A bankruptcy court has the inherent equitable power to correct its own mistakes. *See* e.g., *In re Isaacman*, 26 F.3d at 633 (bankruptcy court should exercise its equitable powers to allow late-filed non-dischargeability complaint when creditor reasonably relied on bankruptcy court's erroneous statement of the bar date). *In re Kelton Motors, Inc.*, 135 B.R. 758 (D.Vt.1991) (creditor had right to receive notice of bar date even though creditor aware of bankruptcy case, therefore late claim treated as timely).

For the foregoing reasons, the judgment of the Bankruptcy Court denying appellant Alcatel's motion to have its late-filed notice of claim treated as timely filed is REVERSED. Because the court finds that the Bankruptcy Court erred in denying Alcatel's motion, this court does not reach the second issue presented by appellant regarding the constitutionality of Section 726(a) of the Bankruptcy Code.

Summary

The judgment of the Bankruptcy Court in the December 10, 1998 and February 16, 1999 Orders is REVERSED. The case is REMANDED for further proceedings consistent with this opinion.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ALCATEL CONTRACTING (NA), INC.,	)	BANKRUPTCY CASE NO. 96-71325-MHM
Appellant,	)	ADVERSARY NO.
v.	)	CIVIL ACTION FILE NO. 1:99-cv-741-GET
SLAUGTER COMPANY & ASSOCIATES,	)	
Appellee/Debtor,	)	
NEIL C. GORDON,	)	
Trustee	)	

JUDGMENT

This action having come before the court, Honorable G. Ernest Tidwell, United States District Judge, for consideration of the appeal of the bankruptcy judgment in the orders entered 12/10/98 & 2/16/99, and the court having rendered its decision, it is

Ordered and Adjudged that the judgment of the bankruptcy court is **reversed**, the case is **remanded** for further proceedings, and the appeal is **dismissed**.

Dated at Atlanta, Georgia this 9th day of September, 1999.

LUTHER D. THOMAS
CLERK OF COURT

By: /s/ Pamela Wright
Deputy Clerk

Prepared, Filed, and Entered
in the Clerk's Office
September 9, 1999
Luther D. Thomas
Clerk of Court

By: /s/ Pamela Wright
Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ALCATEL CONTRACTING, (NA), INC., Appellant,	)	
v.	)	CIVIL ACTION
SLAUGHTER COMPANY & ASSOCIATES, Appellee/Debtor.	)	NO. 1:99-cv-741-GET
NEIL C. GORDON, Trustee.	)	

ORDER

The above-styled matter is presently before the court on the motion by Trustee Neil C. Gordon for reconsideration of this court's September 8, 1999 Order [docket no. 14].

A motion for reconsideration should be filed only when, after careful consideration, it is deemed "absolutely necessary" by the movant. LR 7.2E, NDGa. Such a motion may not be employed as a vehicle to tender new legal theories or to introduce new evidence that could have been presented in conjunction with the previously filed motion or response. Rather, motions for reconsideration serve the limited purpose of correcting manifest errors of law or fact, or in certain instances, calling newly

discovered evidence to the court's attention. Thus, the court is willing to reconsider a prior ruling on an issue in the face of new mandatory authority.

After considering the Trustee Neil C. Gordon's motion for reconsideration, the court adheres to the ruling set forth in its September 8, 1999 Order [docket no. 12]. Therefore, Trustee Neil C. Gordon's motion for reconsideration [docket no. 14] is DENIED.

Summary

The motion by Trustee Neil C. Gordon for reconsideration of this court's September 8, 1999 Order [docket no. 14] is DENIED.

SO ORDERED, this 4 day of November, 1999.

/s/ C. Ernest Tidwell
C. ERNEST TIDWELL,
JUDGE
UNITED STATES DISTRICT
JUDGE

APPENDIX E

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	)	CHAPTER 7
SLAUGHTER COMPANY & ASSOCIATES,	)	CASE NO. 96-71325
Debtor.	)	

ORDER

Alcatel Contracting (NA), Inc. ("Alcatel") filed a motion "To File Proof of Unsecured Claim After Bar Date." This Bankruptcy case was filed as a no-asset case. When assets became available for distribution to creditors, Trustee requested a notice to creditors to file claims. That notice, advising creditors of the May 12, 1998 bar date for filing proofs of claim, was mailed to the address in the record for Alcatel. Alcatel's address, however, had changed and, therefore, the address to which the notice was mailed was incorrect. Additionally, the notice was not sent to Alcatel's attorneys, who had filed a notice of appearance for Alcatel. As a result, Alcatel did not learn of the bar date for filing proofs of claim until June 2, 1998.

Permission of this court to *file* a proof of claim, tardily or otherwise, is unnecessary. *See*, 11 U.S.C. §502(a). *See also, In re Good*, Case No. 94-76219 (Bankr. N.D.Ga., November 21, 1996). Additionally, unless an objection to Creditor's claim is filed, the claim will be deemed allowed as filed. *Id.*

The record shows that no objection to Alcatel's claim has been filed. Section 726 sets forth priority of distribution of assets in a Chapter 7 case. Because Alcatel had actual notice of Debtor's bankruptcy case, Alcatel's tardily-filed claim is entitled to the treatment set forth in 11 U.S.C. §726(a)(3), i.e. Alcatel will receive distribution of any property of the estate remaining after payment of all priority claims and all timely-filed or deemed-timely-filed claims.

As a practical matter, it is unlikely in the instant case that the timely-filed claims will be paid in full. Therefore, the intent of Alcatel's motion appears to be extension of the claims bar date to permit Alcatel's claim to receive treatment as a timely-filed claim. This court cannot, however, grant such an extension. Because Alcatel had actual notice of the filing of Debtor's *case*, the lack of actual notice of the claims bar date does not provide grounds for excusing Alcatel's failure to timely file a proof of claim. *See, Byrd v. Alton*, 837 F. 2d 457 (11th Cir. 1988); *Ford Business Forms, Inc. v. Sure Card, Inc.*, 180 B.R. 294 (S.D. Fla. 1994). Therefore, because permission to *file* a late claim is unnecessary and because this court cannot grant an extension of the claims bar date to permit timely filing of Alcatel's claim, it is hereby

ORDERED that the Motion of Alcatel Contracting (NA), Inc. To File Proof of Unsecured Claim After Bar Date is denied in part and granted in part: granted to the extent that Alcatel may file the claim, but denied to the extent it seeks such filing to be deemed timely.

The Clerk, U.S. Bankruptcy Court, is directed to serve a copy of this order upon Debtor, Debtor's attorney, Creditor, and the Chapter 7 Trustee.

IT IS SO ORDERED, this the 9th day of December, 1998.

/s/ Margaret H. Murphy
MARGARET H. MURPHY
UNITED STATES
BANKRUPTCY JUDGE

APPENDIX F

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	)	
SLAUGHTER COMPANY & ASSOCIATES,	)	CHAPTER 7
	)	CASE NO. 96-71325
Debtor	)	

ORDER

By order entered December 10, 1998 (the "Order"), the motion of Alcatel Contracting (NA), Inc. ("Alcatel") "To File Proof of Unsecured Claim After Bar Date" was denied. Alcatel has filed a motion for reconsideration.

This bankruptcy case was filed as a no-asset case. Shortly after the case was filed, Alcatel filed a Request for Notices, providing the address for Alcatel's attorney and for Alcatel. When assets became available for distribution to creditors, Trustee requested a notice to creditors to file claims. That notice, advising creditors of the May 12, 1998 bar date for filing proofs of claim, was mailed to the address in the record for Alcatel but not to Alcatel's attorney. Alcatel's address, however, had changed and, therefore, the address to which the notice was mailed was incorrect. Alcatel had not filed a notice of its change of address with this court. As a result, Alcatel did not learn of the bar date for filing proofs of claim until June 2, 1998.

The Order denied Alcatel's request to treat its late-filed proof of claim as timely filed and entitled to distribution *pro rata* with other timely filed claims. Based

upon the principles set forth in *Byrd v. Alton*, 837 F.2d 457 (11th Cir. 1988); *Ford Business Forms, Inc. v. Sure Card, Inc.*, 180 B.R. 294 (S.D.Fla. 1994), this court concluded that, because Alcatel had actual notice of Debtor's bankruptcy case, Alcatel's tardily-filed claim is entitled to the treatment set forth in 11 U.S.C. § 726(a)(3), i.e. Alcatel will receive distribution of any property of the estate remaining after payment of all priority claims and all timely-filed or deemed-timely-filed claims. Additionally, although the Bankruptcy Clerk erroneously failed to serve Alcatel's attorney with the notice of the bar date for filing proofs of claim, Alcatel *was* served at the address last provided to the court.

Motions for reconsideration are addressed in BLR 9023-1, which provides:

> Motions for reconsideration shall not be filed as a matter of routine practice. Whenever a party or attorney for a party believes it is absolutely necessary to file a motion to reconsider an order or judgment, the motion shall be filed with the Clerk of Court within 10 days after entry of the order or judgment. Responses shall be filed not later than ten days after service of the motion. Parties and attorneys for the parties shall not file motions to reconsider the Court's denial of a prior motion for reconsideration.

Motions filed pursuant to Bankruptcy Rule 9023 to alter or amend judgments must be served within ten days after entry of judgment. Alcatel's motion for reconsideration was filed eleven days after entry of the Order. Therefore, it was not timely filed.

Pursuant to Bankruptcy Rule 9024, a movant may seek relief from a judgment or order if the motion is filed within a reasonable time. A movant may obtain such relief from a judgment or order for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under [Bankruptcy] Rule [9023];

(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(6) any other reason justifying relief from the operation of the judgment.

A motion for reconsideration is not intended to be used as a vehicle to tender new legal theories or introduce new evidence that could have been presented in conjunction with the original motion. *In re Freeman*, Civil Action No. 1:88-CV-1320-JTC (N.D.Ga. June 21, 1989). "Motions for reconsideration serve the limited purpose of correcting manifest errors of law or fact or, in certain instances calling newly discovered evidence to the Court's attention." *Id.* at page 2.

Alcatel's motion for reconsideration does not set forth any newly discovered evidence. Alcatel presents legal arguments which it could have presented in conjunction with the original motion. Principally, Alcatel argues that denial of its request to treat its claim as timely filed will deprive Alcatel of constitutional due process. Alcatel does not cite any Eleventh Circuit or U.S. Supreme Court law which would contradict the principles in [sic] set forth in *Alton v. Byrd. See also, Volpe v. Sadeghy*, Civil No. 1:95-cv-3212-JEC (N.D.Ga., April 30, 1998). Bankruptcy Rule 9006(b)(3) reflects the firm Congressional intent that the bankruptcy court possesses extremely limited power to extend the deadlines in Bankruptcy Rule 3002(c). Accordingly, it is hereby

ORDERED that Alcatel's motion for reconsideration is denied.

The Clerk, U.S. Bankruptcy Court, is directed to serve a copy of this order upon Debtor's attorney, Creditor, Creditor's attorneys and the Chapter 7 Trustee.

IT IS SO ORDERED, this the 12th day of February, 1999.

/s/ M.H. Murphy
MARGARET H. MURPHY
UNITED STATES BANKRUPTCY
JUDGE

APPENDIX G

UNITED STATE [sic] BANKRUPTCY COURT
Northern District of Georgia (Atlanta)

IN RE: CASE NO: 96-71325
Slaughter Company & Associates, mhm
58-1567790

2964 Ember Drive
Decatur, GA 30032

*** * * NOTICE FIXING TIME FOR * * ***
FILING PROOFS OF CLAIM

You were previously notified that the schedule of the Debtor(s) disclosed no assets available for distribution to creditors. The Trustee now reports that funds may be available for distribution.

Therefore, you are hereby notified that, if you wish to participate in any distribution which may be paid from the estate, you must file a proof of claim on or before;

05/12/98

If you have already filed your proof of claim, it is unnecessary to refile.

Dated: 2/12/98

For the Court
W. Yvonne Evans
Clerk

File with:
Clerk of Court
Northern District of Georgia
Atlanta Division
1340 Russell Federal Bldg
75 Spring Street, SW
Atlanta, GA 30303

TRACOR

11400 Commerce Park Drive
Reston, Virginia 22091-1506

CERTIFICATE OF SERVICE

District/off: 113e-1 User: hunter Page 1, 2, 3 of 3
Date Rcvd:
Feb 12, 1998

Case: 96-71325 Form ID: poc Total Served: 178

The following entities were served by first class mail on Feb 14, 1998.

db	Slaughter Company & Associates, 2964 Ember Drive, Decatur, GA 30032
aty	James C. West, III, Suite 246, 246 Sycamore Street, Decatur, GA 30030-3328
tr	Neil C. Gordon, Macey, Wilensky, Cohen, Wittner, etal, Suite 600, Marquis Two Tower, 285 Peachtree Center, NE, Atlanta, GA 30303-1229
ust	C. David Butler, Office of the US Trustee, Room 362, Richard B Russell Bldg, 75 Spring Street SW, Atlanta, GA 30303
1637445	AAA SIGNS & SAFETY PRODUCTS INC, P O BOX 87238, ATLANTA GA 30337
1637328	ACTION TIRE COMPANY, ATTN: BANKRUPTCY DEPT, 410 LEEIS MILL ROAD, FOREST PARK GA 30050
1637329	ADP PAYROLL & 401K DIVISION, ATTN: BANKRUPTCY DEPT, 5680 NEW NORTHSIDE DRIVE SUITE 170, ATLANTA GA 30345

1637330 ADVANCE DRAINAGE SYSTEMS, ATTN: BANKRUPTCY DEPT, DEPT 1130, CINCINNATI OH 45263-1130

1637331 ADVANTA BUSINESS SERVICES CORP, ATTN: BANKRUPTCY DEPT, POST OFFICE BOX 1228, VOORHEES NJ 08043-1228

1637332 AGENCY PREMIUM SERVICES, ATTN: BANKRUPTCY DEPT, POST OFFICE BOX 75150, BALTIMORE MN 21275-5150

1637455 AGGRECON INC, 1339 CANTON RD SUITE B, MARIETTA GA 30066

1637333 AIRBORNE EXPRESS, ATTN: BANKRUPTCY DEPT, POST OFFICE BOX 91001, SEATTLE WA 99111

1637335 AIRTOUCH CELLULAR, ATTN: BANKRUPTCY DEPT, POST OFFICE BOX 105818, ATLANTA GA 30348-5019

1637334 AIRTOUCH PAGING, ATTN: BANKRUPTCY DEPT, POST OFFICE BOX 105045, TUCKER GA 30085-5045

1637447 ALCATEL CONTRACTING INC, 2001 WESTSIDE PKWY #190, ALPHARETTA GA 30201

1637336 ALTERNATIVE RENTAL, ATTN: BANKRUPTCY DEPT, 1068 FOREST PARKWAY, LAKE CITY GA 30260

1637337 AMERICAN RADIO, 3770 GREEN INDUSTRIAL WAY, CHAMBLEE GA 30341

1637338 AMSTERDAM PRINTING, POST OFFICE BOX 701, AMSTERDAM NY 12010

1637450 AP ARCHITECTURE INC, 6407 IDLEWILD RD #500, CHARLOTTE NC 28212

1637339 ARCHER-WESTERN CONTRACTOR, SUITE 160, 340 INTERSTATE NORTH PARKWAY, ATLANTA GA 30339

1899393 AT & T Corp., One Oak Way, Berkeley Heights, NJ 07922

2335441 AT&T, One Oak Way, Berkeley Heights, NJ 07922

1637445 AT&T, POST OFFICE BOX 27-680, KANSAS CITY MO 618 -068

1637343 AT&T, 2 Gatehall Drive, Parsippany, NJ 07054

1637344 AT&T, POST OFFICE BOX 945800, MAILAND FL 32794-5800

1637346 AT&T, POST OFFICE BOX 914500, ORLANDO FL 32891-4500

1637341 ATLANTA BEVERAGE & BOTTLED WATER INC, 3645 PRESIDENTIAL PARKWAY, ATLANTA GA 30340

1637342 ATLANTA GAS LIGHT COMPANY, 89 ANNEX, ATLANTA GA 30389-0005

1637327 ATLANTA GAS LIGHT COMPANY, ATTN: BANKRUPTCY DEPT, POST OFFICE BOX 4569, ATLANTA GA 30302-4569

1637380 AUGUST GARTSIDE, 120 HANDCOCK DR, WOODSTOCK GA 30188

1973235 Advanta Leasing Corporation, 1020 Laurel Oak Rd., P.O. Box 1228, Voorhees, NJ 08043

1637470 B J SLAUGHTER, 2916 FIEDER WAY, REX GA 30273

1637451 BAKER CONCRETE CONSTRUCTION/ INSITE, P O BOX 386, ALPHARETTA GA 30239

1637465	BELLSOUTH, C/O JAMES M ANDERSON III PC, 5770 POWERS FERRY RD NW #205, ATLANTA GA 30327
1637348	BELLSOUTH, 85 ANNEX, ATLANTA GA 30385-0001
1637347	BELLSOUTH MOBILITY, SUITE 600, GLENRIDGE DRIVE, ATLANTA GA 30342-1368
1637349	BROOKS BERRY HAYNIE, STATION N, POST OFFICE BOX 20174, ATLANTA GA 30325
1637467	CAROL S POWELL, 4317 BUCKINGHAM CIRCLE, DECATUR GA 30035
1637350	CAROLINA CRANE INC, POST OFFICE BOX 6578, N AUGUSTA SC 29841
1637466	CASTLE ABATEMENT CORP, 620 RAMSEY AVE, HILLSIDE NJ 07205
1637351	CITY OF ATLANTA REVENUE COLLECTOR, 105 CITY HALL, ATLANTA GA 30303
1637352	CLARKLIFT OF ATLANTA INC, 610 NORTH-SIDE DRIVE NW, ATLANTA GA 30318
1637464	CLARKLIFT OF ATLANTA INC, C/O GARY G AGNEW ESQ, 1884 GEORGIAN TERRACE, CHAMBLEE GA 30341
1637355	CONSTRUCTION MARKET DATA, POST OFFICE BOX 941847, ATLANTA GA 31141
1637460	CURLIS CAMPBELL, 3104 WESLEY BEND, DECATUR GA 30034
1637353	Colonial Pacific Leasing Corp., Post Office Box 1100, Tualatin, OR 97062-1100
1637366	D&J AUTO PARTS INC, 6882 MAX CLELAND BLVD, LITHONIA GA 30058

1637356 DEKALB COUNTY GEORGIA, REVENUE & LICENSE ADMINISTRATION, POST OFFICE BOX 100001, DECATUR GA 30031-7001

1637357 DEKALB COUNTY REVENUE COLLECTIONS, POST OFFICE BOX 1088, DECATUR GA 30031

1637358 DEKALB COUNTY TAX COMMISSIONER, POST OFFICE BOX 105002, ATLANTA GA 30348-5002

1637466 DEKALB COUNTY TAX COMMISSIONER, P O BOX 100004, DECATUR GA 30031-7004

1637359 DEKALB COUNTY WATER, POST OFFICE BOX 1027, DECATUR GA 30031-1027

1637360 DEKALB TOOL RENTAL, 3757 COVINGTON HIGHWAY, DECATUR GA 30032

1637361 DELUXE BUSINESS FORMS, POST OFFICE BOX 64500, ST PAUL MN 55164-0500

1637362 DEPARTMENT OF TRANSPORTATION, CONTRACT ADMINISTRATION ROOM 215, NO 2 CAPITAL SQUARE, ATLANTA GA 30334

1637363 DEREK DAILY, 149 HONEY SUCKLE CIRCLE, LAWRENCEVILLE GA 30245

1637364 DIAMOND BLADE WAREHOUSE, POST OFFICE BOX 46550, LINCOLNWOOD IL 60646

1637365 DIXIE CONSTRUCTION PRODUCTS, 4891 CLARK HOWELL HIGHWAY, COLLEGE PARK GA 30349

1637440 DUNN AND BRADSTREET, P O BOX 75949, CHICAGO IL 60675-5949

1637485 DYKES PAVING & CONSTRUCTION CO INC, C/O WILLIAM E ZACHARY JR, 1000 COMMERCE DR, DECATUR GA 30030

2083526 Dekalb Co, Treasury & Accounting, P.O. Box 1086, Decatur, GA 30031

1637367 EMRO MARKETING COMPANY, P O BOX 710964, CINCINNATI OH 45271-0964

1637368 EVANS SAND & GRAVEL INC, 114 QUARRY ROAD, STOCKBRIDGE GA 30281

1733629 Evans Sand & Gravel Inc., c/o Ernest D. Blounts, Esq., P.O. Box 427, Stockbridge, GA 30081

1637369 FAMILY CARE S DEKALB, 6038 COVINGTON HIGHWAY, DECATUR GA 30035

1637370 FARM PLAN, DEPT 77175, P O BOX 77000, DETROIT MI 48277-0175

1637371 FAULKNER CONCRETE PIPE COMPANY, P O BOX 1000 DEPT 165, MEMPHIS TN 38148

1637372 FEDERAL EXPRESS/, P O BOX 1140, MEMPHIS TN 38101-1140

1637373 FFI RENTALS INC, 3442 PINEMONT, HOUSTON TX 77018

1637449 FIRST STATE BANK, 4806 NORTH HENRY BLVD, STOCKBRIDGE GA 30281

1637326 FIRST UNION BANK, CENTRAL RECOVERY VA 7359, POST OFFICE BOX 13765, ROANOKE VA 24037-3765

1637484 FIRST UNION NATIONAL BANK, CENTRAL RECOVERY, P O BOX 13765, ROANOKE VA 24037-3765

1637374 FOLEY PRODUCTS CO, THE CONCRETE COMPANY, P O BOX 7877, COLUMBUS GA 31908-7877

1637376 FORD MOTOR CREDIT COMPANY, P O BOX 105332, ATLANTA GA 30349-5332

1637375 FORD NEW HOLLAND CREDIT, P O BOX 0507, CAROL STREAM IL 30132-0507

1637378 FRANKLIN QUEST, P O BOX 31456, SALT LAKE CITY UT 84131-0456

1637377 FRANKLIN'S PRINTING, 6125 COVINGTON HIGHWAY #8, DECATUR GA 30035

1637379 FUELMAN/MCFUEL FLEET SYSTEM, P O BOX 939353, ATLANTA GA 30377

1637384 G NEIL COMPANIES, P O BOX 451179, SUNRISE FL 33345-1179

1637462 GA DEPT OF REVENUE, P O BOX 740387, ATLANTA GA 30374-0387

1637463 GA Dept. of Labor, 148 International Blvd., Atlanta, GA 30303-1751

1637381 GE CAPITAL TOTAL AUDIO, 1990 DEPOOR AVENUE, ATLANTA GA 30318

1637439 GEORGIA CASUALTY, 4370 PEACHTREE ROAD, ATLANTA GA 31119-0720

1637382 GEORGIA POWER COMPANY, 96 ANNEX, ATLANTA GA 30396

1637454 GEORGIA UTILITY CONTRACTORS ASSOC, 1657 PHONIX BLVD SUITE 1, COLLEGE PARK GA 30349

1637383 GMAC, P O BOX 53014, CHARLOTTE NC 28253-3014

1637385 GOVERNMENT DATA PUBLICATIONS, 1155 CONNECTICUT AVE NW, WASHINGTON DC 20036

1637386 GRAINGER, 3417 LAWRENCEVILLE HIGHWAY, TUCKER GA 30084-5024

1637387 GRANITE CONSTRUCTION CO INC, 4888 FRONTAGE ROAD, FOREST PARK GA 30050

1637480 GUSTAVO RESENDIZ, 530A CASANOVA ST. ATLANTA GA 30315

1637441 HALLIBURTON SERVICES, 1981 JONESBORO RD, ATLANTA GA 30315

1637388 HERTZ RENTAL, P O BOX 26390, OKLAHOMA CITY OK 73126-0390

1637389 HOME DEPOT, P O BOX 660335, DALLAS TX 75266-0333

1637390 HOWELL INDUSTRIAL CLINIC, HELIAN HEALTH GROUP, 1100 SPRING ST SUITE 610, ATLANTA GA 30309

1637461 INTERNAL REVENUE SERVICES, P O BOX 105703, ATLANTA GA 30348-5703

1733625 Interstate East Office Park, Attn: Bankruptcy Dept., 2964 Ember Drive, Ste. 100, Decatur, GA 30034

1637391 J&L ASSOCIATES INC, P O BOX 42761, ATLANTA GA 30311

1637392 JOBTRAK, 1990 WESTWOOD BLVD #260, LOS ANGELES CA 90025

1637472 JOHNNY EPPS, 802 CREST DR, DECATUR GA 30035

1637399 L&W FINCH CONSTRUCTION, 1591 CONSTLEY MILL RD, P O BOX 90370, CONYERS GA 30208-8370

1637393 LASER PRODUCTS INC, 100 LASER INDUSTRIAL CT, FAIRBURN GA 30213

1637394 LEACH SAND AND GRAVEL INC, 379 LEES MILL ROAD, FOREST PARK GA 30050

1637395 LEASING ASSOCIATES, P O BOX 243, HOUSTON TX 77001

1637482 LEE PHILLIPS, 4133 CHURCH ST #S-2, CLARKSTON GA 30021

1637396 LENOX HEALTHCARE INC, 3155 PRESIDENTIAL DR #104, ATLANTA GA 30340

1637471 LEOPOLD CLARKE, 4356 PLEASANT PT DR #D, DECATUR GA 30034

1637448 LEVERAGE LEASING CO, 4125 SOUTH 94TH ST, OMAHA NE 68127

1637397 LIGHTNIN TRUCK RENTAL, 2555 UNIVERSITY PKWY, LAWRENCEVILLE GA 30243

1637398 LINDSEY JACKS DBA T&M HAULING, 1578 VAN BLECK AVE SE, ATLANTA GA 30316

1637457 Liberty Mutual Insurance Company, 100 Main Street, Dover, New Hampshire 03820

1637400 MARABLE-PIRKE INC, P O BOX 310023, ATLANTA GA 31131-0023

1637401 MARTIN-ROBBINS FENCE CO, 5197 HIGHWAY 78, STONE MOUNTAIN GA 30087

1637325 MAURICE TURNER, HASSETT COHEN & BEITCHMAN, 990 HAMMOND DRIVE SUITE 990, ATLANTA GA 30328

1637452 MAURICE TURNER, 4830 BROWNS MILL RD, LITHONIA GA 30058

1637483 MAURICE TURNER, CIO HASSETT COHEN & BEITCHMAN, 990 HAMMOND DR #990, ATLANTA GA 30328

1637402 MCARTHUR CONCRETE PRODUCE, P O BOX 798, ACWORTH GA 30101

1637403 MEDICAL SOLUTIONS INC, P O BOX 652, GRAYSON GA 30221-0652

1637476 MELVIN MCDOWELL, 2092 MARK TRAIL, DECATUR GA 30032

1637478 MICHAEL A MOSELY, 3196 CHAPEL ST, SCOTTDALE GA 30079

1637404 MICHAEL WELCH, 3399 PEACHTREE RD NE, ATLANTA GA 30326

1637405 MILLER SANITARY SUPPLIES, P O BOX 162, MCDONOUGH GA 30253

1637473 MILTON J LEE, 115 PLANTATION DR, CLARKSTON GA 30021

1637456 MITCHELL CONSTRUCTION CO INC, 6169 WEST LEES MILL ROAD, RIVERDALE GA 30274

1637406 MOBILECOMM, 72 PERIMETER CENTER E #7201, ATLANTA GA 30346

1637468 MONICA SLAUGHTER, 3669 MEADOW GLEN CIRCLE, ELLENWOOD GA 30049

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1677393 Mountain West, d/b/a Office Depot Credit Plan, P.O. Box 7004, Sioux Falls, SD 57117

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1637408	NATIONAL CONSTRUCTION PRODUCTS, P O BOX 670854, MARIETTA GA 30066
1637409	NEFF RENTAL, 3763 LONGMIRE WAY, DORAVILLE GA 30340
1637410	NORTHLAKE REGIONAL MEDICAL, 1455 MONTREAL RD, TUCKER GA 30084
1637443	Nationwide Property & Casualty Ins. Co., 3300 Williston Rd., Gainesville, FL 32608
1637412	OFFICEMAX CREDIT PLAN, P O BOX 182378, COLUMBUS OH 43218-2378
1637413	OWSLEY & SONS INC, P O BOX 651726, CHARLOTTE NC 28265-1765
2320606	Office of Tax Commissioner, Dekalb County, 120 W. Trinity Place, Decatur, GA 30030
1637414	PERSONNEL JOURNAL, P O BOX 55965, BOULDER CO 80322-5695
1637415	PLANTS BY DESIGN, 3044 WALLACE LAKE RD, DOUGLASVILLE GA 30135
1637444	PRADEEP K PATNAIK, 3920 RIVER RIDGE RD, CHARLOTTE NC 28226
1637416	QUALITY BUSINESS SOLUTION, P O BOX 941293, ATLANTA GA 30341
1637417	RAM TOOL & SUPPLY COMPANY, P O BOX 941293, ATLANTA GA 30341
1637475	RAUL MARTINEZ, 1295 ROBERTS DR APT 1, ATLANTA GA 30315
1637442	REINFORCED EARCH CO, P O BOX 777-W3385, PHILADELPHIA PA 19175-3385

1637418 RIDGEWAYS, P O BOX 420797, ATLANTA GA 30342

1637481 ROBERTO A SOTO, 2637 OLD HAPEVILLE #15A, ATLANTA GA 30315

1637477 RODNEY L JACKSON, 3850 MEMORIAL DR #C7, DECATUR GA 30035

1637419 ROLLINS TRUCK RENTAL, 1481 DOGWOOD DRIVE, CONYERS GA 30207

1637420 ROLTIME COURIER SERVICES, P O BOX 723006, ATLANTA GA 31139-0006

1637354 RON BOLAR DBA COMPUTER ZONE, SUITE B, 3256 ATLANTA ROAD, SMYRNA GA 30080

1637421 RUSSIA HOUSE INC, 4651 ROSWELL RD S201-C, ATLANTA GA 30342

1637422 RYDER TRUCK RENTAL INC, P O BOX 938, JONESBORO GA 30237

1790873 Ryder Shared Services Center, 6000 Windward Parkway, Alpharetta, GA 30302

1637424 S M RYCE ELECTRIC, 2889 KNOLLVIEW DR, DECATUR GA 300034

1637423 SIGNS R US, 4765 MEMORIAL DR SUITE B, DECATUR GA 30032

1637425 SOUTHERN METER, P O BOX 550171, TAMPA FL 33655-0171

1637426 SOUTHERN REGIONAL, 11 U RIVERDALE ROAD, RIVERDALE GA 30274

1637427 STAMEY STEEL & CONCRETE, P O BOX 106, LITHIA SPRINGS GA 30057

1637428 STANDARD TRUCK, & EQUIPMENT, 1155 HILL ST SE, ATLANTA GA 30315

1637479 STEVE SLAUGHTER, 3669 MEADOW GLEN CIRCLE, ELLENWOOD GA 30049

1637429 SUPERSIGNS SUPERFAST, 7308 GA HIGHWAY 85, RIVERDALE GA 30274

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1637469 TERRY SLAUGHTER, 269 HIGHWAY 138 #805, RIVERDALE GA 30274

1637458 TEXACO/LANCE OIL CO INC, 3475 LAKE DR, SMYRNA GA 30082

1637340 THE ATLANTA JOURNAL & CONSTITUTION, POST OFFICE BOX 4689, ATLANTA GA 30302

1637431 THOMAS CONCRETE, 2700 CUMBERLAND PKWY #500, ATLANTA GA 30339

1637432 TIP DEPT 587, P O BOX 9708, MACON GA 1297-9708

1637433 TRAVEL INFORMATION SERVICES, 278 HILDERBRAND DR NE, P O BOX 720715, ATLANTA GA 30358

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1637434 UNSFORD THURMOND, 1054 HILL ST. ATLANTA GA 30315

1637459 URBAN MILLS, 6501 TREE CREST PKWY, DECATUR GA 30035

1887355 United Health Care, 450 Columbus Blvd., P.O. Box 150450, Hartford, CT 06115-0450

1637453 WACHOVIA CORPORATION, P O BOX 101935, ATLANTA GA 30392

1637435 WILLIE BROOKS CONTRACTING, 1165 BANKHEAD HIGHWAY, ATLANTA GA 30318-6675

1637474 WILLIE LEE MADDOX, P O BOX 446, LOCUS GROVE GA 30248

1637436 WORLD OMNI FINANCIAL CORP, P O BOX 105218, ATLANTA GA 30348-5218

1637437 XEROX CORP, P O BOX 7598, PHILADELPHIA PA 19101-7598

1637438 XTRA LEAVE, P O BOX 99262, CHICAGO IL 60693-9262

1741123 Xerox Corporation, 800 Carillon Parkway, St. Petersburg, FL 33716

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NONE. TOTAL:0

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2062446 * Melvin McDowell, 2092 Mark Trial, Decatur, GA 30032

TOTALS: 0, *1

I, Joseph Speetjens, declare under the penalty of perjury that I have served the attached document on the above listed entities in the manner shown, and prepared the

Certificate of Service and that it is true and correct to the best of my information and belief.

Date: 02/14/98

Signature: /s/ Joseph Speetjens

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 99-15093-JJ

IN RE: SLAUGHTER COMPANY & ASSOCIATES,

Debtor.

ALCATEL CONTRACTING (NA), INC.,

Plaintiff-Appellee,

versus

NEIL C. GORDON,

Trustee-Appellant.

On Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19___, ___ F.2d ___).

(Filed Sep. 25, 2000)

Before: TJOFLAT and HULL, Circuit Judges, and PROPST*, District Judge.

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*Honorable Robert B. Propst, U.S. District Judge for the Northern District of Alabama, sitting by designation.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Phyllis Kravitch
UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)

MOTION FILED
JAN 17 2001

(2)

No. 00-1024

In The

Supreme Court of the United States

NEIL C. GORDON, as Chapter 7 Trustee for the Estate of Slaughter Company & Associates, Inc.,

Petitioner,

v.

ALCATEL CONTRACTING (N.A.), INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

MOTION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE ON BEHALF OF THE NATIONAL ASSOCIATION OF BANKRUPTCY TRUSTEES

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20pp

QUESTION PRESENTED

Whether the 11th Circuit erred by creating an open-ended rule which applies equitable principles to the treatment of an unsecured creditor's late-filed proof of claim in a Chapter 7 bankruptcy proceeding which is prejudicial to third-parties.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF THE NATIONAL ASSOCIATION OF BANKRUPTCY TRUSTEES

The National Association of Bankruptcy Trustees respectfully petitions this Court for leave to file the annexed brief Amicus Curiae pursuant to Supreme Court Rule 37.2(b). Written consent of all the parties was sought pursuant to Supreme Court Rule 37.2(a). The Petitioners have given their consent to this Amicus brief. However, the Respondents have refused to consent to the filing of the Amicus brief.[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

The National Association of Bankruptcy Trustees (NABT) is a non-profit organization formed for the purposes of improving the administration of bankruptcy proceedings. The NABT was founded in 1982. The NABT has approximately 1,400 members of whom 1,000 are bankruptcy trustees. It is the responsibility of a bankruptcy trustee, under the supervision of the United States Trustee's Office, to administer bankruptcy proceedings through the discovery and liquidation of assets, to determination of and payment of proper claims. The issues before this Court are of extreme interest to all members of

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[1] Petitioner's consent has been filed with the Clerk of Court.

the Association in that it directly impacts on their ability to perform their statutory duties.

Respectfully submitted by:

FURR AND COHEN, P.A.
Counsel for National Association Of Bankruptcy Trustees
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Senate Report No. 95-989, 9th Cong., 2d Sess. 93 (1978) 3

BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF BANKRUPTCY TRUSTEES[2]

The National Association of Bankruptcy Trustees respectfully submits this brief Amicus Curiae.

IDENTITY AND INTEREST OF AMICUS CURIAE

The identities and interests of Amicus Curiae are set forth in the preceding motion and are adopted herein.

OPINIONS BELOW AND JURISDICTION

Amicus hereby adopts Petitioner's description of the opinions below and jurisdictional statement.

STATEMENT OF THE CASE

Amicus adopts Petitioner's statement of the case.

REASONS FOR GRANTING CERTIORARI

The opinion of the 11th Circuit, adopting the decision of the District Court, sets forth an open-ended ruling

[2] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the Amicus Curiae, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

which could prohibit bankruptcy trustees from complying with their statutorily imposed duties. The decision of the 11th Circuit directly contravenes the stated policies underlying the Bankruptcy Code.

28 U.S.C. §581 et seq. creates and sets forth the rules governing the United States Trustee's Office. 28 U.S.C. §586 states "(a) each United States Trustee, within the region for which United States Trustee is appointed, shall – (1) establish, maintain, and supervise a panel of private trustees that are eligible and available to serve as trustees in cases under Chapter 7 of Title 11; . . . " 28 U.S.C. §586 further mandates the supervision of panel trustees to ensure conformance with provisions of the Bankruptcy Code as set forth in United States Code Title 11, the Federal Rules of Bankruptcy Procedure, and the Statement of Operational Policy promulgated by the Executive Office for the United States Trustee.

11 U.S.C. §704 states "the trustee shall – (1) collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible for the best interest of the parties in interest; . . . (5) if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper; . . . (6) make a final report and file a final account of the administration of the estate with the court and with the United States Trustee."

The legislative history of 11 U.S.C. §704 states "the trustee's principle duty is to collect and reduce to money the property of the estate for which he serves, and to close out the estate as expeditiously as is compatible with the best interest of the parties in interest". House Report

No. 95-595, 95th Cong., 1st Sess. 379 (1977); Senate Report No. 95-989, 9th Cong., 2d Sess. 93 (1978). The Court's interpreting §704(1) have held it is the primary duty of the trustee to close the estate expeditiously and that the other clauses of this section are merely directory as to what the trustee shall do in accomplishing this main object and purpose. See *In re: Hutchinson*, 5 F.3d 750 (4th Cir. 1993); *In re: Riverside-Linden Inv. Co.*, 925 F.2d 320 (9th Cir. 1991).

This duty is also required by implication from the other provisions of the Code and the Federal Rules of Bankruptcy Procedure, especially Federal Rule of Bankruptcy Procedure 1001. Rule 1001 provides that the Rules shall be construed to secure the just, speedy, and inexpensive determination of every case.

The 11th Circuit decision in this case would act to prohibit the Legislative intent from being accomplished and to prevent the Trustees from performing their statutorily proscribed duties. The 11th Circuit decision is apparently based on equitable considerations which this Court has previously ruled should not be considered in applying the plain language of the statutes and rules comprising the Bankruptcy Code.

For example, Bankruptcy Rule 4003(b) states that the trustee or any creditor may file objections to a list of property claimed as exempt within thirty days after the conclusion of a meeting of creditors held pursuant to Rule 2003(a) or the filing of any amendment to the list or supplemental schedules unless, within such period, further time is granted by the Court. In *Taylor v. Freeland and Kronz*, 112 S.Ct. 1644 (1992), the bankruptcy trustee failed

to file an objection within the thirty day period. The Trustee later filed an objection due to the fact that the debtor stated no proper legal basis for claiming exemptions. In rejecting the trustee's argument, this court refused to apply the equitable consideration that the trustee asserted and held that the plain wording of the statute prohibited a late filing of an objection.

In *Pioneer Inv. Services Co. v. Brunswick Assoc. Limited Partnership,* 507 U.S. 380 (1993), this Court refused to apply equitable principles to create an excusable neglect standard for failure to timely file a proof of claim. 11 U.S.C. §726 as well as Rules of Bankruptcy Procedure 3002(c) and 9006(b)(3) provide no basis to permit a late filed proof of claim to be treated as timely filed as furthering the legislative policy of prompt closure and distribution of the debtor's estate. The 11th Circuit's application of equitable principles contravenes the plain meaning of these Statutes and Rules and are in direct contradiction of this Court's prior rulings and the legislative intent behind the Bankruptcy Code.

The 11th Circuit's decision further fails to set forth any standards or tests to be applied rendering the determination to allow a late filed claim as being deemed timely filed. 11 U.S.C. §704(9) requires the trustee in a chapter 7 case to make a final report and a final account of the administration of each case. The Statement of Operational Policy promulgated by the Executive Office of the United States Trustee is contained in the Handbook for Chapter 7 Trustees, the applicable portions of which are attached as an Appendix to this Brief.

Pursuant to the Operational Policy, final report and final account prepared in conjunction with 11 U.S.C. §704(9), must be submitted to United States Trustee for review before filing with the Court. "The Asset Final Report must be prepared as soon as all assets have been liquidated, all monies collected, and the bar date has expired for creditors to file claims, and all claims reviewed or determined by the court." Handbook for Chapter 7 Trustees (April 1992), Page 56. The trustee is required to remove all funds from interest bearing accounts and perform various other tasks. Once the U.S. Trustee's office has determined that the trustee has properly concluded administration of estate property, the Report is forwarded to the Court for approval. Upon being filed with the Court, the Clerk's office mails a copy of the Notice of Filing of the Final Report to all creditors at which time the creditors may review the Report to determine what funds they will receive and whether they feel an objection is appropriate. If no objections are filed, or after court consideration of an objection, the court enters appropriate orders authorizing distribution and payments. These payments are made in conjunction with the statutory scheme set forth in 11 U.S.C. §726.

The record below is unclear as to the status of the bankruptcy case at the time the late filed claim was allowed. Should this Court determine equitable principles should be permitted to be applied in allowing a late filed claim, those equitable principles should equally be applied in determining at what stage of the proceedings the prejudice to creditors in the estate outweighs the prejudice to the party filing the claim should such claim not be allowed. For example, once a Trustee's Final

Report has been reviewed by the Court and approved, should a creditor still be able to file a claim, which claim, of necessity, would mandate complete recalculation of the Report and the recommencing of the filing process? Should creditors, who have been informed of a distribution they are to receive, have to then be told that that distribution will not be forthcoming, rather some lesser amount? Should the delay of the process after the money has been moved out of an interest bearing account prior to the filing of a Report be permitted? These are all questions the 11th Circuit failed to address. The open-ended Rule allowing equitable principles to be used to allow a late filing of a claim to be deemed timely filed will serve to create prejudice to those parties who complied with the Rule and timely filed a claim. Such a Rule does not promote finality as required by the Bankruptcy Code, but rather serves to promote delay as well as increased costs and expense. The 11th Circuit's ruling interferes with the Trustee's ability to administer an estate effectively.

CONCLUSION

For the foregoing reasons, Amicus respectfully urges this Court to issue a Writ of Certiorari to review the decision of the 11th Circuit because the decision is in contravention of the Bankruptcy Code, Federal Rules of Bankruptcy Procedure, Statement of Operational Policy of the United States Trustee's Office and in direct contravention of prior decisions of this Court. The 11th Circuit's ruling hampers the ability of the Chapter 7 Trustee to effectively administer the bankruptcy estate and renders

the plain meaning of 11 U.S.C. §726 and Bankruptcy Rules 3002 and 9006 meaningless. Accordingly, the 11th Circuit must be reversed.

Respectfully submitted,

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APPENDIX A

Handbook For Chapter 7 Trustees

* * *

E. ASSET CASE CLOSINGS

1. FINAL REPORT (PRE-DISTRIBUTION REPORT)

Section 704(9) requires a trustee in a chapter 7 case to make a final report and final account of the administration of the case. The final report (and final account) should be submitted to the United States Trustee for review before filing it with the court. While individual districts may have local court rules or policies concerning the asset final report, basic criteria apply to the closing of cases.

The asset final report must be prepared as soon as all assets have been liquidated, all monies collected, the bar date has expired for creditors to file claims, and all claims reviewed or determined by the court. Obtaining a ruling on claims by the court prior to the filing of a final report is the most expedient manner of proposing proper distribution.

In order to compute the amounts to be disbursed, all funds should be transferrerd from any interest bearing account to the estate checking account (unless otherwise provided in your local district). If funds are invested in a Certificate of Deposit or an investment that has not yet matured, it may be in the best interest of the estate to delay final closing until it has matured. Trustees should not, however, make an investment that will predictably delay closing.

All outstanding applications for profesional compensation and expenses should also be filed along

with the final report. The final report will enable the United States Trustee and any other party in interest to determine how the trustee proposes to disburse the funds.

The final report should summarize all actions taken by the trustee to administer the case. Each report must:

- Describe specifically the disposition of each estate asset (as listed in the debtor's schedules or otherwise discovered). Form 1, the Estate Property Record and Report, may be included in the final report to meet this requirement.
- Report all financial transactions by the trustee. Form 2, the Cash Receipt and Disbursement Record, may be included in the final report to meet this requirement.
- Request payment of trustee's commission and all trustee expenses and any unpaid professional fees and expenses.
- Report the trustee's actions on claims or their disposition.
- Propose distribution to creditors according to § 507 and § 726.
- Attach original bank statements and original canceled checks (from estate accounts) received by the trustee during the case.

In preparing a final report or order of distribution, the trustee must follow the payment priorities established by § 507 and § 726. Claims must be paid in the order they appear in that section. The order of payment is as follows:

- First, costs of administration allowed under § 503(b), including trustee's fees, professional

fees, and certain post-petition claims, and costs and fees assessed under chapter 123 of title 28. In a case converted from chapter 11, the trustee will be advised by the United States Trustee of any unpaid fees required to be paid pursuant to 28 U.S.C. § 1930(a)(6) during the pendency of the chapter 11 proceeding. These fees are not subordinated to the chapter 7 administrative expenses under § 726(b) as are the administrative expenses incurred in the chapter 11 case.

- Priority claims are paid next. Each category of priority claims under each paragraph of § 507 must be paid in full before moving to the next paragraph.
- Unsecured creditors. Within any class of claims, if insufficient funds exist to pay all claims in full then, the balance of funds are prorated among that class of creditors. Proration is made as follows:
  - Calculate the total amount of the claims in the category to be paid.
  - The percentage of the dividend is calculated by dividing the amount of claims into the balance on hand. Multiply that percentage by the amount of each claim allowed to find the amount to be paid on that claim. The formula is:

$$\frac{\text{Balance on Hand}}{\text{Amount of Claims}} = \% \times \frac{\text{Amount Claimed}}{} = \text{Dividend Amount}$$

The United States Trustee reviews the final report in order to assess whether the trustee has properly and completely administered estate property. Upon completion of this reveiw, the United States

Trustee forwards the final report to the court. If there is a dispute between the United States Trustee and the trustee concerning the report, the final report will be filed and the dispute resolved by hearing before the court.

After the trustee's final report has been reviewed by the United States Trustee Office, and filed with the court, the clerk's office should mail a copy of the notice of the filing of the final report to all creditors. Essentially, the notice represents a notice and hearing procedure which informs creditors that the trustee's final report for the case is on file in the clerk's office, that the trustee and other professionals have applied for compensation in given amounts, that the money on hand will be distributed to creditors in accordance with the bankruptcy priority laws, and that the creditors have a right to object to the trustee's report.

If no objections are filed or, upon objection, after court consideration, the court will enter appropriate orders authorizing distribution and payments.

2. DISTRIBUTION OF FUNDS

Upon receipt of the court's order and after any applicable appeal period has expired, the trustee should immediately make disbursements. All disbursements should be made by check from the estate accounts. All checks must be signed by the trustee only.

All checks should include the following:

a. the account number assigned by the bank (this number should be pre-printed on the numbered checks provided by the bank);

b. the caption of the bankruptcy case (e.g., Estate of Mary Smith, Debtor, John Doe, Trustee, case number 86-000);

c. the name of the payee;

d. the amount;

e. the trustee's signature; and

f. a statement advising that the check will be void if not cashed within 90 days.

Checks should be forwarded to the addresses furnished by the creditors on their proof of claims.

Under FRBP 3010, all dividends of less than $5 must be treated as unclaimed funds and turned over the [sic] the clerk of the court. The trustee must furnish the name of the creditor, the creditor's last known address, and the amount of the dividend to the clerk's office. If there is more than one such dividend, only one check made payable to the clerk is necessary, listing the appropriate claim numbers on the check.

If any checks are not negotiated by creditors within 90 days, either the checks are void by operation of the endorsement or the trustee may need to issue a stop payment request on said checks (depending on the procedures established by the trustee with his bank). The amounts represented by these checks are to be treated as unclaimed dividends and deposited with the clerk, according to FRBP 3011, along with a transmittal letter to the court indicating the last known address of the creditor.

However, in those instances where a creditor returns funds to the trustee due to the fact that

the creditor has been paid from another source, the trustee should then redistribute these funds to other creditors according to the priorities set forth in the Bankruptcy Code, § 507 and § 726.

3. FINAL ACCOUNT (POST DISTRIBUTION REPORT)

Once all checks, including those issued to the clerk, have cleared the trustee's account, the trustee should present a final account (post distribution report) to the United States Trustee for review. The final account should indicate that the trustee has completed distribution according to the court's order and no longer holds any estate funds or property. An original bank statement, which shows a -zero- balance, and all canceled checks, should be attached to the final account.

A trustee may request his discharge and the closing of the case in his final account or by other pleadings filed with the final account.

Upon review of the distribution, the United States Trustee will forward all canceled checks and zero balance statements to the clerk to enable the court to officially close the case and discharge the trustee. If the clerk does not accept canceled checks, the United States Trustee will return them to the trustee who must retain them for the two-year period specified in § 322(d) of the Bankruptcy Code, or as otherwise required by the Internal Revenue Service if for a longer period.

In the case closing area, specific local procedures and forms may vary. The trustee should consult with the United States Trustee and receive training prior to the submission of case closing documents.

F. REOPENING OF CLOSED CASES

Occasions may arise when a closed case will have to be reopened to administer unreported or recently discovered assets. The filing of a final report or a final account by a trustee does not close a case, it can only be closed by court order. If a new asset is discovered before a case is closed, the trustee may notify the United States Trustee and the clerk and amend the final report and final account. However, if the court has officially closed a case, the trustee will have to file a motion to reopen the case and state the reasons for reopening.

Supreme Court, U.S.
FILED
JAN 22 2001
CLERK

(3)

No. 00-1024

In The

Supreme Court of the United States

NEIL C. GORDON, CHAPTER 7 TRUSTEE FOR THE ESTATE OF SLAUGHTER COMPANY & ASSOCIATES, INC.,

Petitioner,

v.

ALCATEL CONTRACTING (NA), INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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ZIPP

DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

The Respondent Alcatel Contracting (NA), Inc. ("Alcatel") (now merged with Alcatel NA Cable Systems, Inc.) is a Delaware corporation, and its parent corporation is Alcatel S.A. There is no publically held company that owns ten percent (10%) or more of Alcatel's stock.

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REASON FOR DENYING PETITION

There is no reason, much less the compelling reason required by Rule 10, for the Court to exercise its discretionary authority to review the Eleventh Circuit's decision. In affirming the District Court's decision, the Eleventh Circuit merely applied the age-old principle that a court has the inherent authority to correct its own clerical mistake. Here the principle was applied to a situation when, even though Alcatel's counsel had filed the required notice pursuant to Bankruptcy Rule 9010 expressly directing the Bankruptcy Court to serve counsel with all notices in the case, the Bankruptcy Court inexplicably failed to serve Alcatel's counsel with the notice of the bar date for proofs of claim. The Eleventh Circuit's decision does not conflict with any decisions of this Court or of any other United States Court of Appeal and certainly does not decide an important question of federal law that should be resolved by this Court. Therefore, the petition filed by Neil C. Gordon, as Chapter 7 Trustee for Slaughter Company & Associates, Inc. (the "Trustee"), should be denied.

I.

THE BANKRUPTCY COURT HAS AUTHORITY TO CORRECT ITS CLERICAL MISTAKE IN FAILING TO SERVE ALCATEL'S COUNSEL WITH THE BAR DATE NOTICE

The Trustee contends that Section 726(a)(2) of the Bankruptcy Code, 11 U.S.C. § 726(a)(2), and Bankruptcy Rules 3002(c) and 9006(b)(3) deny a bankruptcy court the power to treat a late-filed proof of claim in a Chapter 7

case as timely even when the creditor is late in filing its proof of claim due to a clerical error by the court. As this Court, however, has noted and numerous other courts have concluded, a court has the inherent authority to correct its own clerical mistake. *E.g., American Trucking Associations, Inc. v. Frisco Transportation Co.*, 358 U.S. 133, 79 S. Ct. 170, 3 L. Ed. 2d 172 (1958); *Gagnon v. United States*, 193 U.S. 451, 24 S. Ct. 510, 48 L. Ed. 745 (1904); *Marshall v. Demos (In re Demos)*, 57 F.3d 1037, 1040 (11th Cir. 1995); *Nicholson v. Isaacman (In re Isaacman)*, 26 F.3d 629, 623-33 (6th Cir. 1994) (cased cited). In addition, a bankruptcy court specifically has the authority under Section 105(a) of the Bankruptcy Code to "issue any order . . . that is necessary or appropriate to carry of the provisions of . . . [the Bankruptcy Code.]" 11 U.S.C. § 105(a). *See also* Bankruptcy Rule 9024 & Fed. R. Civ. P. 60(a) (court may correct clerical mistakes in judgments, orders and other parts of record at any time). Section 105 is given a broad construction, *e.g., Jove Engineering, Inc. v. Internal Revenue Service*, 92 F.3d 1539, 1554 (11th Cir. 1996), and authorizes a bankruptcy court to allow a late filing caused by the court's clerical mistake, even though more specific provisions of the Bankruptcy Code and Bankruptcy Rules do not expressly authorize the late filing. *Accord Demos*, 57 F.3d at 1040 (bankruptcy court should have exercised its equitable powers under Section 105 to allow late-filed dischargeability complaint); *Isaacman*, 26 F.3d at 632-33 (bankruptcy court should exercise its equitable powers to allow late-filed dischargeability complaint when creditor reasonably relies on bankruptcy court's erroneous notice of bar date); *Themy v. Yu (In re Themy)*, 6 F.3d 688, 689-90 (10th Cir. 1993) (bankruptcy

court had inherent equitable power to accept late-filed dischargeability complaint by creditor who relied on bankruptcy court's notice setting incorrect deadline) (cases cited).[1] Neither Section 726(a)(2) of the Bankruptcy Code nor Bankruptcy Rules 3002(c) and 9006(b)(3) preclude the bankruptcy court from exercising its inherent authority to correct a clerical mistake by the court.

As the District Court expressly concluded (Trustee App. 7), once Alcatel's counsel filed its request for notices under Bankruptcy Rule 9010, the Bankruptcy Court had a

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[1] A number of the decisions dealing with the bankruptcy court's authority to accept late filings caused by a clerical mistake concern the late filing of dischargeability complaints under Sections 523 and 727 of the Bankruptcy Code, 11 U.S.C. §§ 523 and 727, and Bankruptcy Rules 4004(a) and 4007(c). The Trustee attempts to distinguish these cases from proof of claim cases. The reasoning of these decisions, however, applies at least equally to cases involving the late filing of a proof of claim due to the court's clerical error, because the provisions of the Bankruptcy Code and the Bankruptcy Rules governing bar dates for filing dischargeability complaints and proofs of claims in Chapter 7 cases are similar. Both Section 726(a)(2) of the Bankruptcy Code dealing with proofs of claim, and Section 523(a)(3), which governs dischargeability complaints, contain a provision regarding the creditors' "notice or actual knowledge of the case in time for such timely filing." 11 U.S.C. § 523(a)(3). Bankruptcy Rules 4004(a) and 4007(c) require a dischargeability complaint to be filed no later than 60 days after the first date set for the Section 341 creditors' meeting, whereas proofs of claim under Bankruptcy Rule 3002(c) must be filed no later than 90 days after the first setting of the creditors' meeting. Allowing a proof of claim filed late due to a court's clerical error is even more compelling because a creditor has a constitutional right to due process before its interests can be impaired. *See, e.g., City of New York v. New York, New Haven & Hartford Railroad Co.*, 344 U.S. 293, 296-97, 73 S. Ct. 299, 301, 97 L. Ed. 333 (1953).

duty under Bankruptcy Rules 2002(e), 2002(g), 3002(c)(5) and 9010 to serve the bar date notice upon Alcatel's counsel. *See, e.g., Richmond v. United States*, 172 F.3d 1099, 1103 (9th Cir. 1999) (creditor entitled to receive all notices provided for under Bankruptcy Rules before rights as creditor impaired); *Demos*, 57 F.3d at 1039 (creditor is entitled to rely on information contained in court order); *Isaacman*, 26 F.3d at 632 (parties entitled to rely on information issued by bankruptcy court); *Kaiser Aerospace & Electronics Corp. v. Teledyne Industries, Inc.*, 229 B.R. 860, 873 (S.D. Fla. 1999) (party has right to assume it will receive all required notices before its claim is barred); *Morgan v. Barsky (In re Barsky)*, 85 B.R. 550, 553 (C.D. Cal. 1988), *aff'd*, 933 F.2d 1013 (9th Cir. 1991) (creditor is entitled to assume that it will receive all notices required by Bankruptcy Rules). Rule 9010 of the Bankruptcy Rules expressly authorizes a creditor to appear in a bankruptcy case through an attorney and to have the attorney act on its behalf. Bankruptcy Rule 2002(g) states that all required notices must be served by the court as the creditor "may direct in a filed request," Fed. R. Bankr. P. 2002(g), and Rule 3002(c)(5) specifies that "[i]f notice of insufficient assets to pay a dividend was given to creditors pursuant to Rule 2002(e), and subsequently the trustee notifies the court that payment of a dividend appears possible, the clerk shall notify the creditors of that fact and that they may file proofs of claim within 90 days after the mailing of the notice." Fed. R. Bankr. P. 3002(c)(5). These rules embody both the concepts of due process and effective assistance of counsel. *E.g., In re Lomas Financial Corp.*, 212 B.R. 46, 53-54 (Bankr. D. Del. 1997) (because its attorney had filed a notice of appearance under Bankruptcy Rule

9010, a creditor was denied due process when the debtor failed to give the creditor's attorney notice of the hearing on the debtor's objection to the creditor's claim, even though notice was given to the creditor and to another attorney in the same firm who was representing a different creditor in the same case); *In re Grand Union Co.*, 204 B.R. 864, 872 (Bankr. D. Del. 1997) (due process requirement of adequate notice not satisfied when bar date notice sent directly to personal injury claimants rather than to known attorney); *In re Birdneck Apartment Associates, II, L.P.*, 152 B.R. 65, 67 (Bankr. E.D. Va. 1993) (because the debtor failed to give notice to creditor's attorney of amended plan and confirmation hearing on plan, the order confirming the amended plan was vacated, even though notice of the plan and hearing was given directly to the creditor); *Pembroke State Bank v. Melvin (In re Melvin)*, 1990 WL 375159 (Bankr. S.D. Ga. Oct. 18, 1990) (order confirming Chapter 13 plan was vacated when, after the creditor's attorney made an appearance of record in the case, the debtor did not give the creditor's attorney notice of the continued confirmation hearing, even though notice of this hearing was sent directly to the creditor). Therefore, as the District Court and the Eleventh Circuit held, under Bankruptcy Rules 2002(g), 3002(c)(5) and 9010, the Bankruptcy Court was required to serve Alcatel's counsel with a copy of the bar date notice, and the Bankruptcy Court clerk's mistake in failing to serve Alcatel's counsel cannot be the basis for effectively disallowing Alcatel's claim.[2]

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[2] Throughout his petition, the Trustee chides the Eleventh Circuit and the District Court for not citing, referencing or

II.

THE ELEVENTH CIRCUIT'S DECISION IS CONSISTENT WITH SECTION 726 OF THE BANKRUPTCY CODE AND THE APPLICABLE BANKRUPTCY RULES

The Trustee argues that "[t]here is no provision in the Bankruptcy Code or Rules which would allow Alcatel's late-filed proof of claim to be treated as timely filed." (Trustee Petition at 11). Yet, as the Trustee acknowledges, the provisions of the Bankruptcy Code should be given their plain meaning. *E.g., Inglesby, Falligant, Horne, Courington & Nash, P.C. v. Moore (In re American Steel Product, Inc.)*, 197 F.3d 1354 (11th Cir. 1999). In construing a statute's plain meaning, the statute must be read as a whole, giving meaning to each of its parts. *E.g., United States v. McLymont*, 45 F.3d 400, 401 (11th Cir.), *cert. denied*, 514 U.S. 1077 (1995). The Trustee contends that under Section 726(a)(2) a creditor's mere knowledge of a pending Chapter 7 bankruptcy case is sufficient notice of the bar date for proofs of claim, but Section 726(a)(2)(C)(i) states that the creditor must have "notice or actual

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addressing Section 726(a)(2) of the Bankruptcy Code and Bankruptcy Rule 3002(c). (Trustee Petition at 6, 9, 10 & 18). The Trustee seems to suggest that the Eleventh Circuit and the District Court somehow ignored or overlooked these provisions. Alcatel and the Trustee, however, briefed Section 726(a)(2) and Bankruptcy Rule 3002(c) at length before both the District Court and the Eleventh Circuit and addressed the same points in oral argument before the Eleventh Circuit. The Eleventh Circuit and the District Court plainly and simply held that the court has the inherent authority to correct its clerical mistake in failing to send the bar date notice to Alcatel's counsel.

knowledge of the case in time for timely filing of a proof of such claim. . . . " 11 U.S.C. § 726(a)(2)(C)(i). The "actual knowledge" under Section 726(a) must be sufficient prior knowledge to allow the creditor to take reasonable steps to protect its interests. *See, e.g., In re Stratton*, 29 B.R. 93, 95 (Bankr. W.D. Ky. 1983) ("actual knowledge" sufficient under Section 726(a)(2) to justify disallowing the claim of a creditor who did not receive actual notice of the bar date must be the equivalent of legal notice); *Mitchell Construction Co. v. Smith (In re Smith)*, 180 B.R. 311, 318 (Bankr. N.D. Ga. 1995) (even though creditor became aware of the bankruptcy case prior to bar date, knowledge of the case was not acquired sufficiently in time to allow a timely filing).

The cases the Trustee cites to support his argument are primarily "asset" Chapter 7 cases. In an "asset" Chapter 7 bankruptcy case, a creditor with actual knowledge of the bankruptcy case easily can calculate the bar date for proofs of claim, because under Bankruptcy Rule 3002(c) the bar date always will be ninety (90) days from the date the Section 341 creditors' meeting is initially scheduled. *See, e.g., Byrd v. Alton (In re Alton)*, 837 F.2d 457, 460-61 (11th Cir. 1988) (with knowledge of case, creditor could refer to Bankruptcy Rules to determine deadlines). By contrast, in a "no asset" Chapter 7 case such as this one, the bankruptcy court expressly directs creditors not to file proofs of claim until they receive further notice from the court and, therefore, a creditor cannot determine the bar date for proofs of claim by simply being aware of the bankruptcy case.

In recognition of this distinction between "asset" and "no asset" cases, Bankruptcy Rule 3002(c)(5) imposes an

affirmative duty upon the bankruptcy court to notify all creditors of the bar date once the Chapter 7 trustee determines that there may be sufficient assets in the estate. This Rule 3002(c)(5) notice is of special significance, because the Chapter 7 bankruptcy case may have been pending for a substantial time before the trustee determines that there are sufficient assets available to justify requiring creditors to file proofs of claim (such as in this case when the case had been pending for eighteen (18) months before the bar date notice was issued).[3] In *United States v. Hairopoulos (In re Hairopoulos)*, 118 F.3d 1240 (8th Cir. 1997), the Eighth Circuit emphasized the significance of this Rule 3002(c)(5) notice and the distinction between "asset" and "no asset" Chapter 7 cases, noting that:

> This type of no-asset notice, explicitly directing creditors not to file claims because they will not be processed or acknowledged, cannot be the type of notice that put the IRS on inquiry notice that its claim may be further affected. No duty to inquire could be imputed under the facts of this case.

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[3] Because creditors in a "no asset" Chapter 7 case are directed not to file proofs of claim until they receive further notice to do so, a "no asset" Chapter 7 case is analogous to a Chapter 11 case. In a Chapter 11 case, courts uniformly have held that, as a matter of due process, a known creditor must receive notice of the bar date before its claim can be discharged, and the failure to receive the bar date notice excuses a late-filed claim. *E.g., In re Immenhausen Corp.*, 172 B.R. 343, 349 (Bankr. M.D. Fla. 1994); *see Levin v. Maya Construction Co. (In re Maya Construction Co.)*, 78 F.3d 1395, 1399 (9th Cir.), *cert. denied*, 519 U.S. 862 (1996) (mere knowledge of a Chapter 11 case does not inform a creditor of a court-ordered bar date).

118 F.3d at 1246. Therefore, in a "no asset" case, because mere knowledge of the case is not sufficient to enable the creditor to determine the bar date for proofs of claim, Bankruptcy Rules 2002(e) and 3002(c)(5) require the bankruptcy court to send notice of the bar date to all creditors, and a creditor is entitled to rely upon the bankruptcy court's duty to give the required notice.

III.

THIS COURT'S DECISION IN *PIONEER* DOES NOT APPLY

The Trustee argues that the Eleventh Circuit's decision conflicts with this Court's decision in *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993). In *Pioneer*, this Court noted in dicta that the "excusable neglect" standard under Bankruptcy Rule 9006(b)(1) does not apply in Chapter 7 cases. Neither the District Court nor the Eleventh Circuit applied the "excusable neglect" standard. Therefore, *Pioneer* does not apply.

IV.

THE ELEVENTH CIRCUIT'S DECISION PROMOTES CHAPTER 7 POLICY

The Trustee contends that the Eleventh Circuit's decision undercuts the objective in Chapter 7 cases to promptly liquidate and distribute the debtor's estate. Allowing Alcatel's claim as timely filed, however, will not impede in any way the Trustee's liquidation of this

Chapter 7 estate. Alcatel filed its proof of claim approximately one (1) month after the bar date, and the Trustee has not made any distribution to unsecured creditors. In addition, another purpose of bankruptcy is to provide a means for a fair distribution of the debtor's assets to all of its creditors. *See, e.g., Hall v. Goforth (In re Goforth)*, 179 F.3d 390, 395 (5th Cir. 1999); *Chemical Bank v. First Trust of New York (In re Southeast Banking Corp.)*, 156 F.3d 1114, 1118 (11th Cir. 1998)(overriding theme of bankruptcy law is equitable distribution of debtor's assets among creditors). Treating Alcatel's claim as timely filed will further the purpose of ensuring a fair distribution of the Chapter 7 estate. The debtor acknowledged in its schedules filed with the Bankruptcy Court that Alcatel had a liquidated, undisputed and non-contingent claim in the amount of $272,000. Neither the Trustee, the debtor nor any other creditor has ever objected to Alcatel's claim.

Even assuming, however, that allowing Alcatel's claim as timely filed would somehow delay the Trustee's liquidation of this Chapter 7 estate, the goal of promptly distributing a Chapter 7 estate cannot override a creditor's constitutional right to notice before its interests are impaired. Alcatel's counsel was entitled to receive the bar date notice, and the Bankruptcy Court's mistake in failing to serve this notice on Alcatel's counsel cannot be the basis for subordinating Alcatel's claim to the claims of all other unsecured creditors and thereby effectively disallowing Alcatel's claim.[4]

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[4] The Trustee contends that "the Eleventh Circuit has placed the burden upon the Chapter 7 Trustee, and not the creditor, to monitor the Clerk's office matrix to ensure that

V.

THE ELEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL

The Trustee contends that the Eleventh Circuit's decision conflicts with the Ninth Circuit's decision in *Zidell, Inc. v. Forsch (In re Coastal Alaska Lines, Inc.)*, 920 F.2d 1428 (9th Cir. 1990), and that, therefore, a conflict now exists among the Circuits. *Coastal Alaska*, however, is distinguishable from this case. In *Coastal Alaska*, the Ninth Circuit refused to treat the late-filed claim of Zidell, Inc. ("Zidell") as timely, even though Zidell never received a copy of the bar date notice. The court reached this conclusion not simply because Zidell became aware of the bankruptcy case prior to the bar date, but because Zidell never took any action to ensure that it was included on the list

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proper notice is being sent to the appropriate parties in order for the trustee to avoid liability in administering the assets of the estate." (Trustee Petition at 15). There is nothing in the Eleventh Circuit's decision, however, imposing any such duty on the Trustee. A Chapter 7 trustee in a "no asset" case should assist the bankruptcy court in ensuring that all persons entitled to notice of a bar date receive this notice, but neither the Bankruptcy Code, the Bankruptcy Rules nor the Eleventh Circuit's decision imposes a duty on the Trustee to do this. *See* 11 U.S.C. § 704; Fed. R. Bankr. P. 2015. Therefore, the Trustee's suggestion that he may be personally liable for failing to monitor the court's mailings is unsupported. *See, e.g., Mosser v. Darrow*, 341 U.S. 267, 71 S. Ct. 680, 95 L. Ed. 927 (1951) (trustee personally liable for willfully and deliberately breaching fiduciary duty); *In re Smyth*, 207 F.3d 758 (5th Cir. 2000) (bankruptcy trustee not personally liable unless grossly negligent).

of creditors. Even though Zidell learned of the bankruptcy case in early August, 1986, Zidell did not request to be added to the bankruptcy court's mailing list until October 30, 1986, by which time the bar date for filing proofs of claim had already passed. In rejecting Zidell's argument that its late-filed claim should be treated as timely, the Ninth Circuit stated that:

> Thus, Zidell knew that, if assets were found, the court would notify the listed creditors and give them an opportunity to file their claims. Zidell also knew that it had not been named as a creditor and therefore would not receive statutory notice. Under these circumstances, Zidell had sufficient notice and reasonable opportunity to appear as a creditor and receive statutory notice. It should have had itself added to the list of creditors in order to preserve its rights. Unlike the creditor in [City of] New York [v. New York, New Haven & Hartford R.R. Co., 344 U.S. 293, 73 S. Ct. 299, 97 L.Ed. 333 (1953)], Zidell did not act reasonably in waiting to receive notice. . . . Zidell actually received information about the bankruptcy proceedings that was sufficient to put it on inquiry notice. . . . Zidell knew that it was not listed as a creditor. Zidell knew that, unless it took appropriate action, it would not receive, nor was the court required to give, the statutory notice.

920 F.2d at 1431. Therefore, the Ninth Circuit based its decision on Zidell's failure to take any steps to have its name added to the bankruptcy court's list of creditors, not simply on Zidell's awareness of the bankruptcy case.

In reaching its conclusion in *Coastal Alaska*, the Ninth Circuit distinguished *Morgan v. Barsky (In re Barsky)*, 85

B.R. 550 (C.D. Cal. 1988), *aff'd*, 933 F.2d 1013 (9th Cir. 1991), a case similar to this one. In *Barsky*, Carol Morgan ("Morgan") was listed as a creditor on the schedules filed by the debtor Marvin Barsky in his Chapter 13 bankruptcy case, but the bankruptcy court did not send a notice of the bar date to Morgan. In opposing Morgan's request to have her late-filed claim treated as timely, Barsky argued that knowledge of the bar date should be imputed to Morgan because she was aware of the bankruptcy case and the Bankruptcy Rules specify the deadline for filing a proof of claim in a Chapter 13 case. The bankruptcy court agreed with Barsky and denied Morgan's request. On appeal, however, the district court reversed the bankruptcy court, concluding that Morgan, as a creditor listed on Barsky's bankruptcy schedules, was entitled under the Bankruptcy Code and the Bankruptcy Rules to receive the bar date notice. Therefore, the district court held that Morgan's claim could not be denied as untimely when she did not receive the statutorily-required notice. 85 B.R. at 553. Similar to the creditor in *Barsky* (and unlike the creditor in *Coastal Alaska*), Alcatel's counsel filed the required Rule 9010 request for notices in the early stages of the bankruptcy case, well before the Bankruptcy Court sent out the bar date notice; yet the court mistakenly failed to serve Alcatel's counsel with a copy of this notice. Therefore, *Zidell* not only does not conflict with the Eleventh Circuit's decision but suggests that in the same circumstances presented here the Ninth Circuit would have reached the same conclusion as the Eleventh Circuit.

VI.

CONCLUSION

For the foregoing reasons, Alcatel respectfully requests that this Court deny the Petition. In affirming the District Court, the Eleventh Circuit plainly and simply held that the court has the inherent authority to correct its own clerical mistake. The Eleventh Circuit's decision is a proper application of a well-established principle of law, and this case raises no significant legal issues that warrant this Court's review.

Respectfully submitted, this 22nd day of January, 2001.

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